TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 765

HONORABLE RICHARD J. HOPKINS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

FILED

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1943.

—4239

[fol. a] [Caption omitted]

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

In the Matter of the Application of the United States of America for a Writ of Mandamus, or, in the Alternative, for a Writ of Prohibition Against the Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas.

Motion for Leave to File Petition for Writ of Mandamus or, in the Alternative, for a Writ of Prohibition—Filed November 16, 1942

Now comes the United States of America by its attorneys, Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, Special Attorneys for the Department of Justice, and moves for leave to file the petition hereto annexed for a Writ of Mandamus, or, in the alternative, for a Writ of Prohibition and that a rule be entered and issued directing the Honorable Richard J. Hopkins, Judge of the District Court of the United States for the District of Kansas to show cause why a Writ of Mandamus or, in the alternative, a Writ of Prohibition should not issue against him in accordance with the prayer of said petitioner and why said petitioner should not have such other and further relief in the premises as may be just and meet.

Paul L. Aylward, Special Attorney, Dept. of Justice, Topeka, Kansas. Peter F. Caldwell, Special Attorney, Dept. of Justice, Topeka, Kansas. Jacob A. Dickinson, Special Attorney, Dept. of Justice, Topeka, Kansas.

[fol. 2] In United States Circuit Court of Appeals

Order Granting Leave to File Petition for Issuance of Writ of Mandamus—November 15, 1942

Sunday, November 15th, A. D. 1942. Before Honorable Sam G. Bratton, Circuit Judge, on November 15, 1942, at Wichita, Kansas, the following proceeding was had:

The petition in the foregoing cause may be filed and thereupon let an Order issue directing the Honorable

Richard J. Hopkins, Judge of the District Court of the United States for the District of Kansas, to show cause before the United States Circuit Court of Appeals for the Tenth Circuit at Wichita, Kansas, on the 19th day of November, 1942, at 2 o'clock p. m., or as soon thereafter as counsel can be heard, why the Writ of Mandamus or in the alternative, the Writ of Prohibition as therein prayed for, should not be granted. A copy of said petition is hereto annexed and made a part of this rule.

[fol. 3] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF PROHIBITION—Filed November 16, 1942

To the Honorable Justices of the Circuit Court of Appeals for the Tenth Circuit:

Your Petitioner, the United States of America, by Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, its attorneys, acting under instructions of the Attorney General of the United States of America, respectfully shows to your Honors:

1. That on the 30th day of October, 1942 an Affidavit of Personal Bias and Prejudice and Application was filed in the Clerk's office of the District Court of the United States for the District of Kansas by the United States of America, as plaintiff, in Civil Actions Nos. 1233, 1246, 1243 and 1262 then and now pending in the District Court of the United States for the District of Kansas, Third Division. That each of said affidavits was identical in form and substance with the exception of the caption thereof and that a full, true and correct copy of the affidavit filed in case No. 1233 is hereto attached, marked Exhibit A, and made a part hereof and incorporated by reference herein.

That said affidavits were filed ten days prior to the commencement of the November term of said District Court at Fort Scott, Kansas, when and where said actions were triable.

[fol. 4] That on November 9, 1942 the same being the opening day of the November, 1942 term of said Court at Fort Scott, Kansas, the said, the Honorable Richard J. Hopkins, Judge of said Court, announced in open court that he had considered said affidavits and applications and had determined that said affidavits were insufficient and ordered that said applications be denied; and the said Court thereupon set the cases for trial before a jury at Fort Scott, Kansas commencing November 16, 1942.

2. Your petitioner further alleges that the above numbered actions pending in the District Court of the United States for the District of Kansas are actions for the condemnation of lands situated in the State of Kansas whereby the United States of America has acquired the title to said lands for military purposes and in which appraisers appointed by the Court have filed awards from which the United States of America and the landowners have appealed as to approximately forty separate tracts of land involved therein and that on said appeals the parties are entitled to separate jury trials as to each separate tract.

That there is now pending in said Court approximately seventy-five separate condemnation actions by the United States of America for the acquisition of land and interest in land for military, public and war purposes involving approximately 133,077 acres of land and approximately 869 separate tracts of land and further that there are now pending in the above entitled Court approximately 255 separate tracts on appeal for jury trials in the above entitled Court. That the United States of America is the petitioner in all of said cases and has filed Affidavits of Prejudice, personal bias and application in cases numbered 4595, 4597, 4602, 4623 and 4626, all af said affidavits being identical in form, and a copy of said affidavit in case No. 4595 being hereto attached, marked Exhibit B, and by reference made a part hereof, which affidavits were filed on November 9, 1942 and upon which the Honorable Richard J. Hopkins has not taken any action and that the United States of America, as petitioner in said condemnation action, intends to file [fol. 5] formal affidavits within ten days prior to the commencement of any term in the District of Kansas at which any of the pending appeals are triable. That in many of the pending condemnation actions appraisers have not now made any award or report upon which appeals may be predicated. That in addition to the trial of the appeals,

the above entitled Court has jurisdiction in said causes to render numerous interlocutory orders and judgments.

3. Petitioner further alleges that the Affidavits of Personal Bias and Prejudice and Application filed by the United States of America in the above matters were filed in good faith and are sufficient in law and that said application should have been granted.

4. That the petitioner further alleges that the circumstances imperatively demand a departure from the ordinary remedy by appeal and that it is necessary for a Writ of Mandamus or, in the alternative, a Writ of Prohibition to issue in this case by reason of the large number of appeals and other matters pending in said cause, the large amount of money involved therein, the number of landowners and other persons involved therein and the great hardship upon the United States of America and of the persons interested in said lands if the remedy by way of appeal must be exercised by all parties to protect their rights herein. That the parties involved in said causes will be put to a great expenditure of time and money occasioned by separate trials thereon wherein any decision and judgment rendered against the United States of America will be defective for want of power of the said the Honorable Richard J. Hopkins to proceed further in said causes and enter judgments therein and wherein a multiplicity of appeals to the Circuit Court will be required to protect the interest of the United States of America in order to obtain a fair, impartial and unbiased Court in which to try the many cases now pending in the District of Kansas.

Your petitioner therefore prays that a rule may issue from this Honorable Court directed to the Honorable Richard J. Hopkins, Judge of the United States District Court [fol. 6] for the District of Kansas, requiring him to show cause why a Writ of Mandamus should not issue commanding the said Judge to proceed no further in said actions and to enter on the records of the United States District Court for the District of Kansas the fact that a sufficient affidavit of personal bias and prejudice has been filed herein and to order that an authenticated copy thereof be forthwith certified to the senior Circuit Judge of the United States Circuit Court of Appeals for the Tenth Circuit for further proceedings, as provided by law, and directing the said Honorable Richard J. Hopkins, Judge, to show cause

why, in the alternative, a Writ of Prohibition should not issue from this Court directing the said Judge to proceed no further in said actions and why this petitioner should not have such other and further relief in the premises as may be just and meet.

The United States of America, by Paul L. Aylward, Special Attorney, Department of Justice; Peter F. Caldwell, Special Attorney, Department of Justice; Jacob A. Dickinson, Special Attorney, Department of Justice.

[fol. 7] STATE OF KANSAS,
County of Shawnee, ss.:

Before me, the undersigned, personally appeared Paul L. Aylward, Special Atorney for the Department of Justice, Peter F. Caldwell, Special Attorney for the Department of Justice, and Jacob A. Dickinson, Special Attorney for the Department of Justice, and made oaths in due form of law that the matters and facts set forth in the foregoing petition for writ of mandamus or, in the alternative, for a writ of prohibition, are true to the best of his knowledge, information and belief.

Paul L. Aylward, Peter F. Caldwell, Jacob A. Dickinson.

Subscribed and sworn to before me this 14th day of November, 1942. Martha C. Stach, Notary Public. My commission expires September 9, 1946.

[fol. 8] EXHIBIT "A" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

Civil Action No. 1233

UNITED STATES OF AMERICA, Plaintiff,

vs.

16,000 ACRES OF LAND, MORE OR LESS, SITUATE IN LABETTE COUNTY, KANSAS, and CHARLES WATSON, et al., Defendants

AFFIDAVIT OF PERSONAL BIAS AND PREJUDICE AND APPLICATION—Filed October 30, 1942

Howard F. McCue, Clerk

Now comes the United States of America by Paul L. Aylward, Special Attorney, Department of Justice, Peter

F. Caldwell, Special Attorney, Department of Justice, and Jacob A. Dickinson, Special Attorney, Department of Justice, attorneys of record for the plaintiff and condemner in the above entitled action, who state that the United States of America is a party plaintiff in such action or proceeding and do make and file this affidavit in pursuance of Section 21 of the Judicial Code (28 U. S. C. A., Sec. 25).

STATE OF KANSAS,
County of Shawnee, ss.:

Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, being first duly sworn on their oaths, state:

1. That they are each special attorneys of the Department of Justice and attorneys of record in the above entitled cause for the United States of America duly authorized and empowered to make this affidavit for and on its behalf and that they do make this affidavit for and on behalf of the United States of America, a party to the above entitled action.

2. That the affiants for and on behalf of the United States of America, party to this action, state that they jointly and severally verily believe that the Honorable Richard J. Hopkins, District Judge of the United States District Court for the District of Kansas, before whom the above [fol. 9] entitled action or proceeding is to be tried or heard, has a personal bias or prejudice against the United States of America and in favor of the defendants and opposite parties named in the above entitled action.

3. That the facts and the reasons for the belief that such bias or prejudice exists are as follows, to-wit:

(a) That the said Judge has consistently attempted to force the United States of America to voluntarily waive jury trials in the appeals both by the landowners and the government in this section. That at Kansas City, Kansas, on the 27th day of October, 1942, when counsel for the government and attorneys for defendants in other similar condemnation actions were present in the courtroom, the following exchange occurred concerning the question of jury trials in this action:

Mr. Aylward: The government, your Honor, is ready to proceed with the trial at any time of these cases.

The Court: Still demanding jury trials?

Mr. Aylward: The Attorney General has instructed us to demand a jury trial.

The Court: This Court will set for trial a number of cases in the Ft. Scott district in which no jury is demanded, and they will be called for trial on the morning of the 9th day of November.

Mr. Aylward: It is the position of the government——

The Court: This court is not going to approve or endorse any proposition of you gentlemen that calls for an unwarranted expense of money and time on the part of lawyers and farmers who are so badly needed in taking care of their crops to help the government.

Mr. Aylward: We have, your Honor, no authority to waive a jury.

The Court: All right, you get authority, or something, in order to take care of these cases. There isn't any reason why your Department, or some bureau, or office that does not know the war is going on ought to attempt any such unfair tactics.

Mr. Aylward: Apparently they don't figure the tactics are unfair, I am sure, your Honor.

[fol. 10] The Court: They must figure—they must know if they have any judgment at all—that their tactics are utterly unfair to this court.

Mr. Aylward: Of course, I am bound by my superior's instructions in this matter.

The Court: Yes, I have heard that before. I have had lawyers come all the way out from Washington to say to this Court—to say we wish to submit these cases on briefs, when the money for his per diem and salary and expense ought to be going to buy war tanks and airplanes instead of wasting it, and we will proceed to try these cases. I will get back—these at regular term at Ft. Scott. Those cases are in the same condition as yours. Those are cases in another division of this district, and since no juries have been demanded in those cases, why, we will try out a few of them and see if this court can do any better than a jury can.

(b) That in the trial of the appeals, civil actions Nos. 4595, 4597, and 4602, at Topeka, Kansas on October 5, 1942, at the outset of the trial counsel for the United States of America offered a written motion for an order directing

the jury to view the lands involved and the Honorable Richard J. Hopkins made the following remarks indicating personal bias and prejudice against the government, the Department of Justice, and its attorneys:

The Court: Well, some departments of the Government apparently haven't discovered that this Court is in a war, and the money that might be used in taking a jury out to look over the country might very well be properly expended in the manufacture of tanks and airplanes that would help us. Most of these men on the jury know Kansas land pretty well, and with a little description from the witness can likely form a reasonable estimate of its value. I am of the opinion that the request is unreasonable and unwarranted under the circumstances that now confront the country, and for the present at least the motion will be denied.

Mr. Aylward: May it please the Court——

[fol. 11] (c) That further evidencing the Court's personal bias and prejudice against the United States of America, the Department of Justice and its attorneys, on presentation of a motion for new trial in Kansas City, Kansas, on the 27th day of October, 1942 in the actions last referred to, counsel for the government in presenting said motion referred specifically to the court's remarks at the trial of said case and the following exchange occurred:

Mr. Aylward: (reading from transcript of the trial) "The Court: Some Departments of the government apparently haven't discovered this country is in a war."

The Court: Yes, and it is a sad thing that you haven't discovered it either.

Mr. Aylward: We have, your Honor.

The Court: Your attitude does not indicate that you have.

Mr. Aylward: Well, we believe our actions will indicate that we have, because we have done everything in our office that we can to expedite these matters.

The Court: The attitude of the government in spending thousands of dollars where it does not help in any way, without regard to the fact that the war is going on, and when the expenditure isn't necessary and it does not help a bit, indicates that you haven't yet learned that the war is going on.

Mr. Aylward: Your Honor, in these cases—the Ft. Riley Cases, there is $400,000.00 at stake. I mean that is the

difference. Now, rightly, or wrongly, I do not know—I mean, it isn't entirely the decision of my office, or of the Attorney General, but it is the combined opinion of the War Department, who ultimately pays for the Ft. Riley area, and the Department of Justice, that the awards are so exorbitant that they should be contested, and I think that if we can save for the government by verdict on these appeals any money, that we are doing a service to the country.

The Court: You are not doing a service to the country when you put up an expense of $1,000.00 a day to try jury [fol. 12] case, and then you come and tell the court that the jury gave you the best of it, and that is what you told me, because you said the jury had reduced the amount of the appeals.

Mr. Aylward: I told the Court that the jury had reduced the amounts.

The Court: And in spite of the fact that you tell me the jury gave the government the best of it, you came here this morning and take up time arguing a motion for new trial.

Mr. Aylward: The jury has reduced the amount of the appraisers' awards, it is true, but we do not feel that they have reduced it in an amount that it should be reduced, and we feel if we were afforded an opportunity to retry these cases fairly——

The Court: You want to spend $6,000.00 more to try these ten tracts?

Mr. Aylward: It does not cost the government that much to try these cases.

The Court: Well, when you keep these farmers all in court instead of attending to their business, their expense ought to be counted in as a part of the whole thing, because we all ought to help this government, and that is what it figures up to.

(d) At the time of the presentation of the motion for new trial in the civil actions referred to above at Kansas City, Kansas, on October 27, 1942, counsel for the United States objected to the following remark of the Court made at the time of the trial of said cases:

"We only want the facts. I don't want you to try to cover up anything."

and the following colloquy ensued:

Mr. Aylward: The Court is accusing the government of trying to cover up a matter with regard to land values.

The Court: As a matter of fact, you were, weren't you?

Mr. Aylward: No.

[fol. 13] Also at the time of presenting the motion for new trial in Civil Actions Nos. 4595, 4597 and 4602 at Kansas City, Kansas on October 27, 1942, counsel for the United States of America pointed out certain remarks made by the Court in the trial of the case as being prejudicial and the following exchange occurred:

The Court: If this was a colloquy at the bench, of course, the jury did not hear it.

Mr. Aylward: That was after.

The Court: And if that is true, the government is trying to put something misleading in this record again.

(e) That the said the Honorable Richard J. Hopkins after the conclusion of the hearing on said motion for new trial above referred to and after the Court had recessed, in the corridor outside of the courtroom in the post office building at Kansas City, Kansas, accosted Paul L. Aylward, one of the attorneys of record for the United States of America in the above entitled matter, who had presented the motion for new trial on behalf of the government, with the following remark: "You are a pettifogger. You have been pettifogging for two hours and a half."

(f) Further evidencing the said Honorable Richard J. Hopkins' personal bias and prejudice against the United States government and its attorneys of record of the hearing of a motion for new trial at Kansas City, Kansas, on October 27, 1942, the government had subpoenaed in as its witnesses on the hearing of said motion three of the jurors who had sat on the jury that tried the consolidated appeals above referred to at Topeka, Kansas, for the purpose of proving a quotient verdict; that prior to said hearing the Court had instructed the attorneys for the government through the clerk of said Court that the government attorneys should not personally interview any of said jurors; that the government attorneys had not personally interviewed any of said jurors and had not been able to obtain affidavits in support of their motion and did not know what [fol. 14] said jurors would testify to under oath; that the

said Honorable Richard J. Hopkins, the presiding judge on said hearing for a new trial, advised the government attorneys that it was improper to present testimony of a juror as to his verdict, the government attorneys contending that such testimony was proper. The Court declared a recess for the purpose of permitting the government attorneys to find and present cases in support of the government's position. That during said recess without the knowledge or without any notice to counsel for the government, the said Honorable Richard J. Hopkins, by means unknown to the affiants, called the government witnesses into his chambers and made full inquiry from the jurors as to the point in issue, that is, whether or not said verdict was a quotient verdict; that there was no record made of said inquiry of the Court notwithstanding that the government had available at said hearing Miss Florence E. Meisner, Court Reporter, for the purpose of reporting all proceedings in connection with said hearing; that after said recess was over the Court inquired of counsel for the government what the government proposed to prove by the testimony of these witnesses and permitted the government to introduce the testimony of said witnesses; that after the first of said witnesses, a Mr. Brown, was examined by the government's attorneys, the Court inquired of counsel for the government what information the government had that it was relying upon and the affiant, Paul L. Aylward, Attorney for the Department of Justice, stated to the Court that one of the jurors had made a statement to a Mr. Eckleman at Salina, Kansas, to the effect that the verdict was a quotient verdict and that this was the information upon which the government was basing its inquiry. That thereupon the following remarks occurred with regard to the said Mr. Eckleman:

Mr. Aylward: I don't know his initials, your Honor, but you can get hold of him with that address.

The Court: I want you to get hold of him and bring him in here to this Court.

Mr. Aylward: I will do that. I can't do it today. He is in Salina.

[fol. 15] The Court: All right, you do that. I don't like your attitude in these cases. You are not fair—you are not just, and you have two other witnesses here. Are you going to put them on?

Mr. Aylward: I believe, your Honor, that the Court has talked to these witnesses and knows what they will testify to, and there is no point to putting them on the stand because I don't know what they will testify to, and I think that will be all.

The Court: Yes, a few minutes ago I invited these gentlemen to come into my room, and I asked them and made the full inquiry and my inquiry from these jurors demonstrates it to me that they never agreed on anything like a quotient verdict, and I might say to you that they did tell me that in the discussion of the Roe case—do you remember the Roe case?

Mr. Aylward: Yes, I do, your Honor.

The Court: That was the case in which, I think, Mr. Roe had thirteen children, and the government witnesses testified that that was such a poor piece of land, and one of the juror- volunteered the statement in describing this land—they said something like this. That that might be a poor piece of land, but it wasn't so damned poor but what you could raise thirteen children on it. Now, I am giving you as near as I can, the exact language of the juror.

Mr. Sylward: Step down, Mr. Brown.

The Court: Do you wish to introduce your further witnesses?

Mr. Aylward: No, I have no—well, we will call him. Mr. Hennedy.

(g) That the personal bias and prejudice of the said the Honorable Richard J. Hopkins in favor of the defendants in the Federal eminent domain cases pending before him is further disclosed by remarks of the Court at a hearing at Topeka, Kansas, June 29, 1942, before the said Judge on the petition of Firman A. Wood in Civil Action No. 4626 to set aside a written option given by the landowner to the United States of America where the following exchange occurred:

[fol. 16] The Court: Mr. Aylward, if the land is actually worth that, is it right these people should lose all that?

Mr. Aylward: That is their claim. I am not in position to state the land is worth that, your Honor.

The Court: Yes, wouldn't it be all right to let these appraisers file an amended appraisal here to see what their opinion is of the value?

Mr. Aylward: It would not serve the purpose of determining whether these people will be held to the option. That is it. The government appraisement has been set out in the option, $2450.00, and they have agreed to accept that. They have removed improvements from the premises under the terms of the option which they would not have been privileged to do.

The Court: Of course, that should be taken into consideration.

Mr. Aylward: It would have to be taken into consideration on a re-appraisal, but we feel these parties voluntarily entered into this agreement and set this price and accepted it, and now, because there has been an increase in appraisements out in the Fort Riley area, they, of course, would like to get the advantage of that increase.

The Court: Of course, there are various things that I think should be taken into consideration. *I have understood that when some of these folks have been put off their lands and then went to purchase other lands similar to what they had been living on, they found they couldn't buy any such land at these prices, so the Government would be working a hardship on them to compel them to take these lower prices when they can't get anything else like it for that price. I think as an equitable proposition that should be taken into consideration. I don't think the Government has the occasion to waste money hand over fist in some instances and deprive other people of their property at an unreasonable figure.*

During the course of the trial of appeals in Cases Nos. 4595, 4597 and 4602 above referred to, and on the hearing [fol. 17] of the motion for new trial, and at other times, the Court did, on various occasions, wrongfully charge that the Government, the Department of Justice, and its attorneys, were unfair, unjust, attempting to conceal evidence, misrepresenting testimony and wasting money which should be spent for the war effort, and the Court has consistently attempted to interfere with the disposition of the business of the Government, and particularly of the Department of Justice and War Department, and has charged the Government with being unfair in not settling numerous contested cases.

Affiants further state that they verily believe that by reason of the personal bias and prejudice of the said Honorable Richard J. Hopkins against the United States of America — cannot and will not receive a fair and impartial trial before the said Honorable Richard J. Hopkins in pending condemnation cases in this district.

Further affiants saith not.

Paul L. Aylward. Jacob A. Dickinson. Peter F. Caldwell.

Subscribed and sworn to before me this 30th day of October, 1942. Martha C. Stach, Notary Public. My Commission expires Sept. 9, 1946.

Wherefore, the United States of America prays that another judge shall be designated in the above entitled action or proceeding in the manner prescribed in Section 20 of the Judicial Code (28 U. S. C. A. sec. 24) or chosen in the manner prescribed in Section 23 of the Judicial Code (28 U. S. C. A. Sec. 27) to hear all further matters in the above entitled action.

This affidavit is filed this 30th day of October, 1942, and ten days prior to the commencement of the November term of the United States District Court for the District of [fol. 18] Kansas, Third Division, at Ft. Scott, Kansas, as provided in Section 82 of the Judicial Code (28 U. S. C. A. 157).

United States of America, by Paul L. Aylward, Special Attorney, Department of Justice, 302 Columbian Bldg., Topeka, Kansas; by Jacob A. Dickinson, Special Attorney, Department of Justice, 302 Columbian Bldg., Topeka, Kansas; Peter F. Caldwell, Special Attorney, Department of Justice, 302 Columbian Bldg., Topeka, Kansas.

[fol. 19] We, the undersigned, Paul L. Aylward, Special Attorney for the Department of Justice, Jacob A. Dickinson, Special Attorney for the Department of Justice, and Peter F. Caldwell, Special Attorney for the Department of Justice, counsel of record in the above entitled cause, do hereby certify that the above affidavit and application made by the United States of America are made in good faith.

Paul L. Aylward, Jacob A. Dickinson. Peter F. Caldwell, Attorneys of record for the United States of America.

[fols. 20-28] EXHIBIT "B" TO PETITION. (SUBPARAGRAPHS "A" TO "G" INCLUSIVE ARE IDENTICAL WITH THE SAME SUBPARAGRAPHS OF EXHIBIT "A" AND ARE NOT DUPLICATED)

In the District Court of the United States for the District of Kansas, First Division

Civil Action No. 4595

UNITED STATES OF AMERICA, Plaintiff,

vs.

16,438.59 ACRES OF LAND, MORE OR LESS, SITUATE IN RILEY COUNTY, KANSAS; and WILLIAM JAHNKE, et al., Defendants

Affidavit of Personal Bias and Prejudice and Application

[fol. 29] (h) That on the hearing of certain evidence in Topeka, Kansas with regard to Tract No. 7 involving an issue between a tenant and landowner as to the apportionment of an award on October 8, 1942, counsel for the government being present at the trial of appeals in civil actions 4595, 4597 and 4602 above referred to, and in the presence of the jury impanelled to try the appeal cases, the following remarks were made:

Mr. Platt: (As attorney for the landowner) Your Honor, I don't think he has anything before a jury.

The Court: The jury has nothing to do with this matter.

Mr. Snyder: (As attorney for the tenant) Not at all.

The Court: They can just sit here as interested spectators, needn't listen unless they want to. * * *

Mr. Platt: I understand they made an offer to the landlord, but nothing to the tenant. It is under the rule, of course, I presume that it has to come out of the landlord. Whatever is taken down here, whatever allowance is made has to be determined by the Court in the distribution of the funds that are awarded.

The Court: Has the landlord agreed with the Government?

Mr. Platt: No sir, I am afraid that is the rule of law.

The Court: The Government better see about this. * * *

Mr. Aylward: I don't believe these remarks should be made in the presence of the jury.

The Court: This jury hasn't anything to do with this case.

Mr. Aylward: All right.
The Court: I will so instruct them.

[fol. 30] and later on the same occasion during the same hearing the following remark was made by the Court: "I think the Government better reconsider and make a settlement with these people." and later the court stated: "I am suggesting the Government better consider this matter carefully and do justice to these people that it throws off these farms."

During the course of the trial of appeals in Cases Nos. 4595, 4597 and 4602 above referred to, and on the hearing of the motion for new trial, and at other times, the Court did, on various occasions, wrongfully charge that the Government, the Department of Justice, and its attorneys, were unfair, unjust, attempting to conceal evidence, misrepresenting testimony and wasting money which should be spent for the war effort, and the Court has consistently attempted to interfere with the disposition of the business of the Government, and particularly of the Department of Justice and War Department, and has charged the Government with being unfair in not settling numerous contested cases.

Affiants further state that they verily believe that by reason of the personal bias and prejudice of the said Honorable Richard J. Hopkins against the United States of America, its Departments and its attorneys of record, the United States of America cannot and will not receive a fair and impartial trial b- the said Honorable Richard J. Hopkins in pending condemnation cases in this district.

Affiants further state that this affidavit was not filed ten days before the beginning of the May term of said Court for the reason that:

1. The facts set out in said affidavit had not all occurred and were not known until the hearing on the motion for new trial in cases Nos. 4595, 4597 and 4602 at Kansas City, [fol. 31] Kansas on October 27, 1942 and the transcript of said record was not completed until October 30.

2. That it was necessary for counsel to submit the transcript and obtain the Attorney General's instructions for the filing of this affidavit and such instructions were not received until the date of the making of this affidavit.

3. That affidavits of bias and prejudice were filed in cases Nos. 1233, 1243, 1246 and 1262 on October 30, 1942 and that the Court upon being advised of the filing of said affidavit made the statement to counsel for the government that if he were prejudiced in one case, he was prejudiced in all pending condemnation cases but that the Court has neglected and failed to rule on the sufficiency of said affidavit or to take any action thereon; that said affidavits so filed alleged "that the United States of America can not and will not receive a fair and impartial trial before the Honorable Richard J. Hopkins in pending condemnation cases in this district."

4. That in cases Nos. 4595, 4597 and 4602 in which the United States is a party plaintiff, being condemnation actions filed in the above entitled Court, the appeals from the report of appraisers were set for trial on various dates from October 5, 1942 to November 2, 1942 in the May term of said Court and the Court on his own motion, after trying one case involving ten tracts, continued generally the trial of the remaining appeals in said cases and ruled that he would not proceed with any other trials until the Attorney General acted on the Court's suggestion that juries be waived; and that none of said appeals have been set for trial.

[fol. 32] Further affiants saith not.

Paul L. Aylward, Jacob A. Dickinson, Peter F. Caldwell.

Subscribed and sworn to before me this 9th day of November, 1942. Martha C. Stach, Notary Public. My commission expires Sept. 9, 1946.

Wherefore, the United States of America prays that another judge shall be designated in the above entitled action or proceeding in the manner prescribed in Section 20 of the Judicial Code (28 U. S. C. A. Sec. 24) or chosen in the manner prescribed in Section 23 of the Judicial Code (28 U. S. C. A. Sec. 27) to hear all further matters in the above entitled action.

United States of America, by Paul L. Aylward, Special Attorney, Department of Justice, 302 Columbian Bldg., Topeka, Kansas. Jacob A. Dickinson, Special Attorney, Department of Justice, 302 Co-

lumbian Bldg., Topeka, Kansas. Peter F. Caldwell, Special Attorney, Department of Justice, 302 Columbian Bldg., Topeka, Kansas.

[fols. 33-58] We, the undersigned, Paul L. Aylward, Special Attorney for the Department of Justice, Jacob A. Dickinson, Special Attorney for the Department of Justice, and Peter F. Caldwell, Special Attorney for the Department of Justice, counsel of record in the above entitled cause, hereby certify that the above affidavit and application made by the United States of America are made in good faith.

Paul L. Aylward, Jacob A. Dickinson, Peter F. Caldwell, Attorneys of record for the United States of America.

[fol. 59] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO DISMISS—Filed November 20, 1942

Comes now the respondent, Richard J. Hopkins, United States District Judge for the District of Kansas, and moves the court to dismiss the petition in the above entitled cause for the following reasons:

1. The affidavit of prejudice which forms the foundation for the above entitled action is insufficient as a matter of law to show personal bias or prejudice upon the part of the respondent, either in favor of the unnamed landowners or against the Government of the United States.

2. The circumstances pleaded in the petition do not disclose a situation so rare and extraordinary as to justify the extraordinary writ of mandamus or prohibition, and any error upon the part of the respondent in overruling the affidavit of prejudice is reviewable upon appeal in the ordinary course of judicial proceedings.

3. The affidavit of prejudice was not filed "not less than ten days before the beginning of the term of court", as required by 28 U. S. C. A., Section 25, nor was any cause shown in the affidavit for failure to file it within such time.

[fols. 60-80] 4. The affidavit is not made by either party to said action, as required by 28 U. S. C. A., Section 25, and no authority upon the part of the affiants, Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, to make such affidavit on behalf of the United States is shown.

5. The certificate of counsel attached to the affidavit of prejudice is made by the identical persons who made the affidavit of prejudice, contrary to the safeguards provided in 28 U. S. C. A., Section 25.

6. No authority for the maintenance of the present action in the United States Circuit Court of Appeals by Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, on behalf of the United States, has been shown.

Howard T. Fleeson, Austin M. Cowan, Wayne Coulson, Attorneys for Respondent.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION TO DISMISS PETITION FOR THE ISSUANCE OF A WRIT OF MANDAMUS—Nov. 20, 1942

Thirty-seventh Day, September Term, Friday, November 20th, A. D. 1942. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the motion of respondent to dismiss the petition for a writ of mandamus or in the alternative a writ of prohibition, was argued by counsel, Howard Fleeson, Esquire, and Austin Cowan, Esquire, appearing for respondent, Paul L. Aylward, Esquire, appearing for petitioner, and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said motion be and the same is hereby denied.

It is further ordered by the court that respondent may file a response to the petition for a writ of mandamus or in the alternative for a writ of prohibition within fifteen days from this day.

[fol. 82] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

RESPONSE AND ANSWER OF RICHARD J. HOPKINS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS—Filed Dec. 4, 1942

Comes now Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, and for his response and answer to the petition for a writ of mandamus, or in the alternative, for a writ of prohibition, heretofore filed herein, states:

1. Respondent is without sufficient knowledge or information to form a belief as to the truth of the averment that Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson filed this action acting under instructions from the Attorney General of the United States and therefore denies the allegation. Respondent states that there is not on file in this court or in the District Court of the United States for the District of Kansas any commission from the Attorney General of the United States authorizing said Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson to appear on behalf of the United States in this or any other action and that there is not on file in this court nor in the District Court of the United States for the District of Kansas the oath required by special attorneys for the Department of [fol. 83] Justice.

2. As to paragraph one of said petition, respondent denies that the affidavits mentioned, filed on October 30, 1942, were filed ten full days before the convening of the Fort Scott term on November 9. No good cause was shown in the affidavits for not filing them within the time prescribed by law. Other matters in said paragraph one respondent admits.

3. Respondent denies that appeals relating to 255 separate tracts are now pending in the District Court of the United States for the District of Kansas and states that the number is approximately 135. Respondent admits that the government is the petitioner in each of said appeals and admits that in approximately 40 of said appeals landowners

have filed cross appeals. Respondent admits that the government, by and through Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, whose authority is denied by the respondent, has filed affidavits of prejudice in cases numbered 4595, 4597, 4602, 4623 and 4626, and that all of said affidavits are identical in form and a true copy of the affidavit in case No. 4595 is attached to the petition. Respondent denies that this court has authority to enter any interlocutory decrees in the above numbered cases, except upon appeal from reviewable orders or judgments rendered by the District Court of the United States for the District of Kansas. Respondent denies that the parties to said appeals are entitled to separate trials as to each separate tract, and alleges the facts to be that it is discretionary with the court to order consolidation of several of said tracts for the purpose of trial, and that on the trials already had, at Topeka, beginning October 5, and at Fort Scott, beginning November 16, several tracts were consolidated and tried as one jury trial. In the Topeka action ten tracts were tried before a jury and in the Fort Scott action nine tracts were tried before a jury, and that this consolidation and trial of [fol. 84] several tracts together was done at the instance and with the assent of the parties and their counsel, including the attorneys representing the government. Respondent answers that there are now pending approximately 135 appeals, all of which can be disposed of by not more than twelve to fifteen jury trials.

4. Answering paragraph three of said petition, this respondent denies that said affidavits of personal bias and prejudice and the application filed by the United States of America in the above entitled matter, are legally sufficient.

5. Answering paragraph four of said petition, respondent denies that there exist extraordinary and unusual circumstances which demand or warrant a departure from the ordinary remedy by appeal, and denies that there is any occasion whatever for the bringing into use of the extraordinary and unusual remedies of mandamus or prohibition.

Further answering said paragraph of the petition, respondent states that no multiplicity of appeals will result, nor will the parties be put to expenditure of time and money participating in void or defective trial proceedings before this respondent for the reason that this respondent has

agreed that no further trial of land appeals will be conducted by this respondent until the question of the legal sufficiency and validity of the affidavits of prejudice has been finally reviewed and determined.

On this point respondent further answers that no unusual or extraordinary circumstance of possibility or occasion for multiplicity of appeals is presented for the reason that the federal statutes, Title 28, sections 17 to 22, vest full and ample power and authority in the Senior Circuit Judge of the Tenth Circuit Court of Appeals, if he finds that circumstances and conditions warrant it, to make a temporary designation of another judge, and your respondent states [fol. 85] that these provisions of the law operate to defeat the claim that there may arise a multiplicity of appeals as a result of the affidavits of prejudice filed against this respondent.

Further answering said paragraph four, respondent states that no unusual or extraordinary circumstance or condition exists for the reason that the grounds for the affidavits of prejudice are based entirely upon legal rulings in the course of judicial proceedings and legal rulings involving matters of judicial discretion, and it cannot be assumed that another judge assigned for the trial of the land appeals in the District of Kansas would rule differently or adopt an attitude of mind more favorable to the contentions of the counsel for the government, nor that he would be influenced in the making of judicial rulings or in the exercise of his judicial discretion by reason of the affidavits which have been filed against this respondent.

Respondent further states that in the majority of cases the appraisers appointed by the District Court of the United States for the District of Kansas were the appraisers recommended by the special attorneys for the Department of Justice who have signed the affidavit of bias and prejudice herein; that in all cases where awards have been made by said appraisers, except pursuant to option agreements where the award was the same as the option previously taken by the government, Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, on behalf of the government, have appealed from said awards. Unless the government abandons the past policy of appealing each separate award it will appeal each separate judgment, regardless of the judge before whom the case is tried.

6. Taking up seriatim paragraph three of the affidavit of bias and prejudice and the subparagraphs thereunder, (a) to (g) inclusive, this respondent states:

[fol. 86] As to paragraph 3 (a), respondent states that it refers to a proceedings had on a hearing of a motion for new trial at which there were not present any witnesses, any of the parties, nor any member of the jury. This respondent admits that he has on many occasions strongly urged counsel for the government that trial by jury be waived, all in accordance with the spirit and purpose of the new Federal Rules of Civil Procedure. Respondent denies that his remarks narrated in said paragraph two of the affidavit on the hearing of the motion for new trial established or even indicated prejudice on the part of respondent and against the government as a party to the actions.

As to paragraph 3 (b) of the affidavit, respondent states that it is based upon this respondent's denial of the motion of the government for view by the jury of the land involved in the tracts on trial. This paragraph of the affidavit is insufficient in law for the reason that the matters complained of involve a judicial ruling and an exercise of judicial discretion by this respondent. It is well settled by the law of Kansas that a party to a condemnation case is not entitled to have the jury view the premises as a matter of right, the right to a view being entirely within the discretion of the court.

> Fitch v. State Highway, 137 Kan. 584, 21 P. 2d 318;
> Kansas C. R. v. Allen, 22 Kan. 285, 31 Am. Rep. 190;
> Williams v. Kansas City Public Service, 147 Kan. 537, 554, 78 P. 2d 41; and
> 103 A. L. R. 163.

Said paragraph (b) is further insufficient for the reason the matters complained of therein establish the fairness and lack of bias of this respondent in that his reasons were stated in support of a ruling upon a matter which was purely discretionary, and for the reason that the full record concerning the denial of a jury view of the premises establishes absolute absence of any bias or prejudice against any [fol. 87] of the parties to the action. The full record reads:

"Mr. Aylward: May it please the Court the Government has a written motion for an order directing the jury to view the lands. I don't know whether this is the proper time to

take it up, but a ruling at this time would clarify our proceedings. We would know whether we have to go into detail as to contour and the general lie of the land.

"The Court: How much land is involved in this case?

"Mr. Aylward: This particular tract?

"The Court: I mean in the whole case.

"Mr. Aylward: The ten cases consolidated today?

"The Court: Yes, sir.

"Mr. Aylward: Oh, I would judge in the neighborhood of 3000 acres. There are ten different farms, your Honor.

"The Court: How would the jury view this land?

"Mr. Aylward: We can provide them, we have made arrangements with the Commander at Fort Riley to provide Government cars, these big cars. It will take two of them to take the jury out.

"The Court: Take plenty of rubber and time and other expenditures of money to do that, I assume?

"Mr. Aylward: It will probably save time on the trial.

"The Court: How would that save time on the trial?

"Mr. Aylward: Well, if they are not permitted to, we will have to give to them a pretty comprehensive picture of the lie of the land.

"The Court: Well, Fort Riley is about how far? Seventy-five miles from here?

"Mr. Aylward: This portion, I presume, would be around sixty-five miles, your Honor.

"The Court: Well, some departments of the Government apparently haven't discovered that this country is in a war, and that the money that might be used in taking a jury out to look over the country might very well be properly expended in the manufacture of tanks and airplanes that would help us. Most of these men on the jury know Kansas land pretty well, and with a little description from the witness can likely form a reasonable estimate of its value. I am of the opinion that the request is unreasonable and unwarranted under the circumstances that now confront the country, and for the present at least the motion will be denied.

"Mr. Aylward: May it please the Court——

"The Court: Call your first."

[fol. 88] As to paragraph 3 (c) of the affidavit, respondent states that it is insufficient in law for the reason that it is founded upon statements of the court upon a hearing of the motion for new trial in the absence of a jury, wit-

nesses, and parties to the litigation, with only counsel present, and for the reason that the remarks relied upon in said paragraph 3 (c) do not even tend to indicate bias and prejudice of this respondent as to any of the parties to the litigation, and said remarks consist entirely of a narration of matters which are of common knowledge and of which a court would take judicial notice.

As to paragraph 3 (d) of the affidavit, respondent states that the statements therein set out were remarks directed to the counsel in the case and were justifiable from having observed the tactics and conduct of government counsel at the trial.

As to paragraph 3 (e) of the affidavit, respondent states that the statement complained of was made outside the courtroom in the absence of any of the parties to the litigation and in the absence of jurors and witnesses and was directed to one of the attorneys representing the government. Respondent further states that it was a judicial conclusion based upon the presentation of one of the attorneys for the government. It did not relate to the government in any way.

As to paragraph 3 (f) of the affidavit, respondent states that the same is insufficient in law for the reason that under the federal law a juror will not be permitted to impeach his verdict. See McDonald v. Pless, 238 U. S. 264. The transcript of the record shows the following proceedings at the time of the hearing of the motion for new trial when the respondent permitted counsel for the government to interrogate the jurors in reference to their verdict:

"The Court: (Interrupting) All right, state what you are going to prove by each witness.

[fol. 89] "Mr. Aylward: (Continuing): That the jurors agreed when considering these cases that they would each —there are ten tracts, I believe. As each tract was taken up by the jury, that each member of the jury would write out his determination as to the value of that particular tract, and all twelve figures of the jurors would be added, and the sum divided by twelve, and that would be the verdict of the jury as to each tract.

"The Court: By whom will you show that?

"Mr. Aylward: By these jurors that have been subpoenaed.

"The Court: Let's have this record definite.

"Mr. Aylward: Ross Mustoe, Peter Brown and Mr. Kennedy.

"The Court: Do you say on your honor as a lawyer that they are going to show that?

"Mr. Aylward: I say, your Honor, I have never talked to these jurors, and we have subpoenaed them in here in a belief that we can show that.

"The Court: Well, just to satisfy you, while my opinion is that you have no right in the world to do it, call one of your witnesses and let's hear him." (Page 10 of transcript Nos. 4602, 4595 and 4597.)

* * * * * * *

"Mr. Harlan: We object at this time to the inquiry from the juror as to the method or reasons by which this juror or any other members of this jury arrived at a verdict for the reason it is an attempt on behalf of the Government to ask these jurors to impeach their own verdict. It is incompetent, irrelevant and immaterial, not properly a matter for consideration by the Court at this time under the rules of Federal procedure. May I see the motion for new trial?

* * * * * * *

"The Court: I think your objection is good, but in order that we may have all the truth about it, Miss Meisner, will you please read the question to Mr. Brown, and I think I will permit him to answer." (Page 12 of transcript Nos. 4602, 4595 and 4597.)

All jurors were called as witnesses by the government and testified as to how they had arrived at their verdict.

As to paragraph 3 (g) of the affidavit, respondent states that the same is insufficient for the reason that the remarks of the court there complained of, rather than establishing prejudice against any of the parties, established commendable fairness and willingness to do equity between the parties [fol. 90] pertaining to issues requiring the application of principles of equity; and for the further reason that any judicial ruling of this respondent concerning the binding effect of the option executed by the landowner would be appealable, and could not be advanced as a ground of bias and prejudice on the part of this respondent.

As to paragraph 3 (h) of the affidavit, respondent states that the first portion relates to the apportionment of an

award between a landlord and a tenant and was no concern of the government. As the affidavit itself shows, Mr. Aylward, on behalf of the government, stated that it was immaterial that the remarks were made before the jury.

As to the portion of subdivision (h) contained on page eleven of the affidavit, the court simply suggested that it might be advisable for the parties to make a settlement rather than proceed with the trial.

7. Further answering, respondent states that the affidavit of prejudice which forms the foundation for the above entitled action is insufficient as a matter of law to show personal bias or prejudice upon the part of the respondent, either in favor of the unamed landowners or against the United States of America, serving in whose armed forces are respondent's only two sons and, in addition, three nephews.

8. Further answering, this respondent states that the affidavit is not made by either party to said action, as required by 28 U. S. C. A. section 25, and no authority upon the part of the affiants, Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, to make such affidavit on behalf of the United States is shown.

9. Further answering, respondent states that the certificate of counsel attached to the affidavit of prejudice is made by the identical persons who made the affidavit of [fol. 91] prejudice, contrary to the safeguard provided in 28 U. S. C. A. section 25.

Wherefore, respondent prays that the above entitled action be dismissed.

Howard T. Fleeson, Wayne Caulson, Austin W. Cowan, of Wichita, Kansas, Fred Robertson of K. C. K., T. M. Lillard, Attorneys for Respondent.

[fol. 92] MEMORANDUM OPINION—Filed in Circuit Court of Appeals, December 11, 1942

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

Civil Actions Nos. 1233, 1246 and 1262

UNITED STATES OF AMERICA, Plaintiff,

vs.

16,000 ACRES OF LAND, MORE OR LESS, IN LABETTE COUNTY, KANSAS; and CHARLES WATSON, et al., Defendants

[File endorsement omitted.]

Hopkins, District Judge:

These cases have to do with the war. The government in furtherance of the war effort has taken possession of perhaps in excess of 140,000 acres of farm land in Kansas. On application of the government, appraisers were appointed, who have filed reports from which the government has instituted countless appeals. These appeals should be heard and determined without further delay. The matter presently for consideration arises from affidavits filed by counsel alleging personal bias and prejudice of the judge of this court against the government and in favor of the landowners whose lands have been taken. The effect of these affidavits is to further delay, hamper and interfere with the due and orderly disposition of such suits, the burden and inconvenience of which will rest most heavily upon the large group of farmers whose homes and lands have been taken. The affidavits are made by Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, who style themselves special attorneys for the Department of Justice. The same attorneys certify that the affidavits are made in good faith.

[fol. 93] Upon the filing of an affidavit of bias and prejudice it is the duty of the district judge to determine the legal sufficiency of the affidavit and, if insufficient, to refuse to disquality himself. (Scott v. Beams, 10th Cir. 122 F. 2d 777.) The affidavits have been examined with care and compel a decision that they are insufficient in law, and in time of filing.

A consideration of the facts underlying the present controversy may be helpful. They are substantially these:

The government the past year and a half has condemned and taken possession of perhaps in excess of 140,000 acres of land in Kansas for war purposes. In the first instance appraisers representing the government made preliminary appraisements in connection with which efforts were made to procure the land at private sale. Where this failed petitions in condemnation were filed by the government asking for immediate possession. After this was done, and in due course, the government filed applications with the court for the appointment of appraisers. These applications were allowed and special efforts were made by the court to secure in each community those men best qualified to appraise the lands taken. In many, and perhaps most, instances the government suggested the names of such appraisers. In due time, after investigation by the appraisers their reports were filed. Following this the government in approximately two hundred fifty cases appealed from the award of the court appraisers.

The court, in order to take care of any and all emergencies which might arise in connection with such matters, and during the war emergency now pending, remained constantly on duty practically all of the past year. At the regular term of court in Fort Scott, in May, the court suggested a special term in June to try the government cases. Counsel for the government stated they "could not be ready." Early in the summer, realizing the increasing number of govern-
[fol. 94] ment appeals, the court suggested that during the summer months the court could hear many of such appeals if a jury was not necessary. Counsel for the government responding to these suggestions stated "Washington insists on juries in all cases." Jury trials were not practicable during the summer because of excessive heat and because the farmers were too busy to attend trials. The judge of this district has had the cooperation of practically all lawyers of standing in dispensing with juries in nearly all cases, both civil and criminal.

Regular terms of court began the middle of September since which time this court has sought to try appeals in the condemnation cases.

In order to speed up matters and not delay payment to farmers whose lands have been taken, the court has been

of the opinion that trials could be had much more speedily without juries and, while the court urged this procedure, it has not in any instance denied a jury trial. One trial, involving ten tracts from the Fort Riley reservation, was tried at Topeka. A motion by the government for a new trial was denied.

The applicable statute is 28 U. S. C. A., Sec. 25, which according to all the decisions should be strictly construed, and reads:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated, in the manner prescribed in section 24 of the title, or chosen in the manner prescribed in Section 27 of the title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled to any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

[fol. 95] Several questions present themselves.

Do the affidavits establish personal bias against a party to the action (the government)? Did the party to the action (the government) file the affidavits? That is to say, has the government, as a party to the litigation, filed or authorized the filing of the affidavits in question? May an attorney who signs such an affidavit as a party to the action, also certify it as attorney? May alleged errors, which are reviewable on appeal, form a proper basis for an affidavit of personal bias and prejudice against a party to the action? Did a suggestion by the court that "trials be had without

juries'' show personal bias or prejudice against the government? Did the refusal of the court to grant the right of inspection by the jury of lands involved in a trial, show personal bias and prejudice? And, were the affidavits filed ''in time'' as required by the statute?

The significant word in the statute is the word ''personal.'' By personal prejudice is meant an attitude against a *party* to a proceeding derived otherwise than through judicial proceedings. No opinion based upon evidence or the proceedings before a judge can form the basis of a personal prejudice against a party, as such term is used in the statute.

An examination of the authorities fails to disclose a single case which would lend support to the claim that these affidavits state facts sufficient in law. In considering the question of the legal sufficiency of the affidavits, there are certain guides which have been firmly fixed by the decisions. Soon after the enactment of section 25, the Supreme Court had occasion to comment on it. In *Ex Parte Am. Steel Barrel Co.*, 230 U. S. 35, 43, the court said:

[fol. 96] ''The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disquality him * * *''

In Re Lisman, 89 F. 2d 898, part of the syllabus reads:

''A disqualifying affidavit against judge must state facts and reason for belief that personal bias or prejudice exists, and it must be shown that such prejudice exists against affiant, or in favor of his opponent as to preclude impartial judgment by accused judge.'' (Syl. 2)

In *Ryan* v. *United States*, 99 F. 2d 864, we read:

"A judge to be disqualified must have a personal bias or prejudice against a party or in favor of an opposite party, and judicial rulings cannot ordinarily be made basis of charge of bias, since any error in such rulings may be corrected on appeal." (Syl. 10)

In *Price* v. *Johnston*, 125 F. 2d 806, 811, it was said:

"The statute requires that the basis or prejudice be 'personal'. The allegations of the affidavit, as disclosed by the petition for the writ, do not indicate a 'personal' prejudice or bias against the accused, but charge an impersonal prejudice, and go to the judge's background and associations rather than his appraisal of the defendant personally. This is not enough under the statute, and the affidavit must be here held to have been insufficient under the law. The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his opponent.' Appellant's allegations reveal that the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy * * *' Henry v. Speer, 5 Cir., 201 F. 869, 871, 872. See also, Wilkes v. United States, 9 Cir. 80 F. 2d 285, 288, 289; Sacramento Suburban Fruit Lands Co. v. Tatham et ux. 9 Cir. 40 F. 2d 894."

[fol. 97] In *Craven* v. *United States*, 22 F. 2d, 605, 607, the — said:

"At most then, the affidavit charges a 'bias and prejudice', grounded on the evidence produced in open court at the first trial, and on nothing else. We hold that such bias and prejudice (if these be appropriate terms for a well-grounded state of mind * * *) is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extra-juridial origin, derived non

coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind * * *) against wrongdoers, civil or criminal, acquired from evidence presented in the court of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective."

Reasons or comments of the judge in making judicial rulings do not constitute personal prejudice. Neither irritation upon the part of the judge nor comments upon the judicial tactics of a party or his counsel are sufficient to show personal prejudice, whether such comments be discreet or indiscreet. (*Scott v. Beams,* supra.)

Impersonal prejudice resulting from a judge's background or experience or prejudice against a particular type of litigation is not prejudice within the meaning of the statute. (*Price v. Johnston,* 9th Cir., 125 F. 2d 806, supra.)

In *Johnson v. United States* (D. C.) 35 F. 2d, 355, the affidavit of prejudice related to "class of cases", and was held insufficient. In denying the application the court said:

"Moreover, the prejudice charged is not directly alleged to be (that) personal, which alone by the statute is declared to afford basis for disqualification."

Applying the rule to the instant case, it was necessary to show personal bias and prejudice on the part of the judge against the United States, and that this prejudice was of a non-judicial origin. The affidavit states facts in direct contradiction to those necessary to establish such personal bias and prejudice against the United States, or in favor of the unnamed landowners who are parties to the condemnation suits. The affidavit shows that respondent's [fol. 98] entire interest and reason for his comments was that the interests of the United States be protected and that justice be afforded both to the United States and to the landowners. The most that could possibly be said for the affidavit is that the court indicated that from judicial proceedings before him it was his conclusion that the best

interests of the United States were not being served by the tactics adopted by its counsel in the particular condemnation cases. (*Walker v. U. S.*, 116 F. 2d, 458; *Refior v. Lansing Drop Forge Co.*, 124 F. 2d, 440.)

A recent and fine statement as to what is meant by personal bias and prejudice is contained in the concurring opinion of Judge Clark in the case of *National Labor Relations Board v. Baldwin Locomotive Works*, (3d Circuit), 128 F. 2d 39, at page 57. The opinion reads:

"To begin with, respondents's counsel displays a complete misconception of the meaning of a partial mind. Such a mind is one that is closed to justice because some factor dehors the record prevents it from functioning. If it does operate, the fact that counsel does not agree with that operation may indicate such matters as lack of education, legal or otherwise, lack of I. Q., lack of judicial temperament, et cetera, but it does not spell lack of fairness. So the courts forbid any deduction of bias and prejudice from adverse rulings. * * *"

In the instant case it is impossible to sustain the affidavits as being sufficient in law without finding that as a matter of fact the writer of this memorandum has a personal bias and prejudice against the United States, the government of which he is an appointed official, and which he has served for many years. No such finding should be permitted to stand in any court unless and until the facts forming the basis of such allegations are overwhelmingly established and about which there is no reasonable doubt. An affidavit of this character cannot be found to be sufficient in law without finding as a matter of fact that the judge against whom it is made, has a personal bias and prejudice, not against a certain class of cases conducted by the United States of [fol. 99] America, but a personal bias and prejudice against his own government. Bias and prejudice in order to be personal in the meaning of the statute, is not subject to division. It cannot be sub-divided. It is entire. It must be personal against one of the parties to the lawsuit or personal in favor of the other party. It cannot be said to be personal if it applies only to a class of cases, for in that event the prejudice instead of being personal would relate to the nature of the proceeding itself. This court would be derelict in its duty if, knowing the allegations to be utterly

unfounded, he sustained the affidavits in question. Under such circumstances he declines to desert his post of duty.

Were special attorneys authorized to make the affidavits and are the affidavits those of the (or a) party to the action? It will be observed that the statute requires two things. First, an affidavit must be made by a party to the action. Second, it must be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

"Whenever a party to any action or proceeding civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit * * * and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application is made in good faith." (28 U. S. C. A. 25.)

Strict and full compliance with these provisions of the statutes is required. (*Scott* v. *Beams*, C. C. A. 10th Cir., 122 F. 2d, 777-778; *Cuddy* v. *Otis*, C. C. A. 8th Cir., 33 F. 2d 577.)

The purpose of the statutory provision in reference to the requirement of a certificate of counsel of record is well set out in Newman v. Zerbst (C. C. A. 10th Cir.), 83 F. 2d 973, where the court said:

"The affidavit did not 'state the facts and the reasons for the belief' of the existence of such bias or prejudice, and was not accompanied by a certificate of counsel of record that the affidavit and application were made in good faith as required by the statute. Moreover, counsel for petitioner in open court stated he could not make such a certificate.

"It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury."

[fol. 100] The affidavits in the instant case are insufficient in law for the reason that the authority of the attorneys making the affidavits and executing the certificates of good faith are not attached thereto. The affidavits recite a conclusion that said attorneys are special attorneys of the Department of Justice and duly authorized and empowered

to make the affidavits for and on behalf of the United States. This is not sufficient and clearly contrary to proper practice. If the attorney general of the United States authorized the making and filing of these affidavits, his direction and grant of authority should have been a part of such affidavits.

Authority to condemn land is found in 40 U. S. C. A. 257, and the War Emergency Provisions in 50 U. S. C. A. 171. Both of these statutes make it the duty of the Attorney General to cause the proceedings to be commenced. The attorney general and the United States district attorney for the district have the duty of prosecuting all civil actions in which the United States is concerned. (28 U. S. C. A. 485.) In *Confiscation Cases*, 74 U. S. 454, 457, it was said:

"Settled rule is that courts will not recognize any suit, civil or criminal, as regularly before them if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or someone designated by him to attend to such business."

5 U. S. C. A. 310 authorizes persons specially named by the attorney general to conduct legal proceedings which the district attorney may be authorized to conduct. But, attorneys specially appointed under such statute are required to take the oath prescribed for district attorneys and to evidence their authority in the district. The three attorneys making the affidavits and the certificates to the affidavits have in no way evidenced their authority to act for the attorney general, and the affidavits contain no evidence of their authority either to make the affidavits or to execute the certificates of good faith. This is a fatal omission.

In connection with this point, that "no such affidavit shall be filed (by a party to any action) unless accompanied by a certificate of counsel of record that such affidavit and appli- [fol. 101] cation are made in "good faith", two separate and distinct personalities are necessary. One, the party or parties to the action who make the affidavit, and the other, counsel of record who certify that the affidavit and application are made in good faith. Here the same persons, the attorneys who allege they are special attorneys for the department of justice, but without evidencing their authority so to act, make the affidavits of personal bias and

prejudice, and then attempt to execute the certificate of good faith. The affidavits are fatally defective for this reason.

Surely these alleged special attorneys cannot be said to be parties to these land condemnation suits. In *Anchor Grain Co.* v. *Smith*, 297 Fed. 204, an affidavit by Walker, the president of the Anchor Grain Company, was held defective because Walker was not the party to the action. So here. These attorneys are not the party to the litigation. Also the good faith certificate of counsel is indispensable. Speaking of this requirement, in *Beland* v. *United States*, 117 F. 2d 958, 960, the court said:

"This is no meaningless provision; its purpose is obvious. A judge may not consider the truth or falsity of allegations in an affidavit of personal prejudice or bias, and the provision requiring the certificate of a member of the bar is a precaution against abuse of the privilege afforded by the act. The 'good faith' certificate of counsel of record is indispensable and affidavits which are not accompanied by the certificate are insufficient and may not be filed. (Cuddy v. Otis, 8 Cir., 33 F. 2d 577; Newman v. Zerbst, 10 Cir., 83 F. 2d 973; Currin v. Nourse, 8 Cir. 74 F. 2d 273; Morse v. Lewis, 4 Cir., 54 F. 2d 1027; Harry v. Speer, 5 Cir., 201 F. 869, Berger v. U. S., 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481.)"

As pointed out by Judge Murrah, a party could not avoid this requirement of double guaranty of good faith by counting that he, himself, was his own counsel. *Mitchell* v. *U. S.* (C. C. A. 10th Circuit), 126 F. 550.

As above noted the district attorney is the official representative of the government in litigation within the State of Kansas, and the affidavit, if made, should have been made by him. The cases under consideration appear to be directed entirely by the Department in Washington through special attorneys acting in this district.

[fol. 102] It is apparent that the able district attorney is not consulted with respect to these matters. It is my considered opinion that if the district attorney of this district had had charge of these cases for the government, they would have been promptly disposed of, at the least possible expense, and with substantial justice to both parties. It is unfortunate indeed, and certainly regrettable that during a war emergency, when all are expected to give their time,

endeavor and money to the war effort, that delaying tactics should be adopted by attorneys representing the government, at great expense to both the government and the landowners involved in this litigation.

In another condemnation suit it was said by Judges Hutcheson, Holmes and McCord in *In Re Keith* (5th Cir.) 128 F. 2d 908:

"For a speedy trial and justice in the cause at the end of it, is still as clearly the right of the citizen in a court proceeding, when the controversy is with his government as when it is with a private citizen. It may not therefore be successfully contended that individuals may be dragnetted into condemnation suits en masse and because of the size of the dragnet made to wait upon administrative pleasure for trial until settlements and attempts at settlement, going on piecemeal, have been exhausted. Nor is it a sound reason for delaying the trial of such suits that dockets may be congested, for they are in their nature preferred proceedings and it is the duty of the government after instituting them, to leave no reasonable step untaken to bring them to as speedy a conclusion as is reasonably possible."

Under a charge of the character here made, this court is entitled to assurances from two independent sources (as required by statute) that it is made in good faith, namely, the affidavit of a *party* and the certificate of counsel who is his attorney of record. When someone other than the party attempts to make the affidavit for the party, such as in the case of a corporation, there must be a showing that such person has authority to make such affidavit.

In *Cuddy* v. *Otis*, 33 F. 2d, 377, an affidavit of disqualification, made by an attorney in fact, was held insufficient. In the opinion the court said:

[fol. 103] "The affidavit of prejudice upon which petitioner relies is made by one J. L. Love, an attorney in fact for petitioner, is unaccompanied by certificate of counsel, and states, as the facts and reasons for the belief that bias and prejudice exists, the rulings of respondent in denying certain applications for continuance filed in behalf of petitioner. No other basis for the charge of such bias or prejudice is shown.

"The controlling principles involved have been succinctly stated. A motion to disqualify a judge under Section 25,

Vol. 28 U. S. C. A. (Section 21, Judicial Code), can only be made by a party to the litigation. Anchor Grain Co., v. Smith (C. C. A. 5) 297 F. 204."

The certificate itself being an indispensable part of the affidavit is subject to strict construction. The certificate attached to these affidavits recites that the counsel of record, naming them, (being the same counsel who made the affidavit) "hereby certify that the above affidavit and application made by the United States of America are made in good faith." The certificate is defective in form. (U. S. vs. Flegenheimer, 14 F. Supp. 584, 592.)

May alleged errors reviewable on appeal be basis for disqualification?

In paragraph 3 of the affidavit the attorneys urge as a basis for belief that prejudice existed, that the judge endeavored to persuade them to waive jury trials in certain condemnation actions. It should be noted that the statements of the court all took place in open court, were made in the course of judicial proceedings before the court and consisted of statements of the court's reasons why it appeared to him that the best interests of the United States, as well as of the landowners, would be served if many of the cases could be tried to the court instead of to a jury, thereby saving expense both to the government and to the landowners and providing more expeditious disposal of the controversies. They show no bias, personal or otherwise, either in favor of the landowners or against the United States. As before stated, no order was made denying jury trials, and in fact, the only trials which have been held have been tried to juries.

[fol. 104] It appears that others who realize the war emergency, favor waiving of juries. For instance, the Journal of the American Judicature Society for October, 1942, states that "Time Wasted in Court is Aid to Enemies. American Bar Association Speaks," and quotes a resolution of the House of Delegates of the American Bar Association to this effect:

"To expedite the trial of cases and conserve man power during the war period, it is earnestly recommended to the Bench and Bar of the country that * * * whenever practicable jury trials be waived and issues of fact as well as of law be heard by the trial judge. * * * Since the

necessity for saving time in court as elsewhere is now so pressing the American Bar Association resolution should stimulate timid judges. Witnesses and jurors and citizens thoroughly comprehend the need. Lawyers deceive only themselves in looking upon time wasted as government profit. The power and the responsibility is with the judges."

Was personal bias shown in refusing to allow the jury to be taken seventy miles on a two-day trip to view the land?

Petitioners urge that bias upon the part of the judge is shown by a statement made in open court in ruling upon their motion to have the jury view the land in question. "That the motion would be overruled because the request was unreasonable and unwarranted under the emergency confronting the country." The ruling was one resting in the discretion of the court and would be reviewable upon a direct appeal from the final judgment. (*Coughlen* v. *Chicago I. & K. Ry. Co.*, 36 Kan. 422; 13 P. 815; *U. S.* v. *Meyer*, 7th Cir., 113 F. 2d, 387.) No bias or prejudice was indicated by the fact that the court overruled a motion in the ordinary course of a judicial proceeding. No objection was made by petitioners to the court's statement upon the ground that it was prejudicial to the rights of the government in the action then pending, but the complaint simply is that the court made an erroneous ruling. If the ruling was erroneous, it can be corrected upon appeal.

In addition to this the trial record shows it would have been entirely improper to have had the jury view the land because of the changes that had occurred.

Petitioners complain of the court's statement to government counsel on the hearing of their motion for a new trial [fol. 105] in the jury cases tried at Topeka, Kansas, that counsel's attitude indicated that they did not know that there was a war on and that it was his opinion that nothing would be gained by ordering a new trial. If any error was committed in overruling the motion it can be corrected on appeal. There is nothing in the court's statement "that it would be a useless waste of money to have another (new) trial" to justify even an inference of bias.

Complaint is made of the implication from the court's statement made in the argument of the motion for new trial that government counsel were trying to cover up evidence relating to the value of the land in controversy in

the case then on trial. This statement was the court's conclusion from observing the tactics and conduct of counsel at the trial and cannot be said to be a basis for bias of any kind. It was a conclusion reached from hearing the evidence and observing the conduct of counsel in the case.

Complaint is made of the court's statement to government counsel in the hearing upon the motion for a new trial that if a colloquy took place at the bench the jury did not hear it and if this was true, the government counsel were attempting to put something misleading in the record by indicating that it did take place in the presence of the jury. This was a conclusion which the court had a right to draw from the conduct of counsel appearing before him and was the exercise of his judicial duty to see that the record spoke the truth. It indicates neither bias nor prejudice against either the government or its counsel.

Complaint is made that after the hearing of the motion for a new trial at Kansas City, Kansas, the court remarked to Paul L. Aylward, one of the petitioners, in the corridor outside of the courtroom, that he was a pettifogger, and had been pettifogging for two hourse and a half. The court's statement was a judicial conclusion based upon the presentation of the motion for a new trial just concluded. Any reasonable person reading the transcript of the hearing [fol. 106] upon the motion for a new trial would arrive at the same conclusion. The remark indicated no personal bias, either against the United States or against counsel. It was merely a criticism of the lengthy presentation of a motion which could have been presented in a short time.

The affidavits state that counsel endeavored to show that the jury had arrived at its verdict by the quotient method. The court during a recess inquired of three jurors in chambers as to how they had arrived at their verdicts. What of it! It is difficult to understand counsel's urging of these facts to indicate bias and prejudice against the government in this litigation. The federal rule is well settled that a federal juror will not be permitted to impeach his verdict by his testimony. (*McDonald* v. *Pless,* 238 U. S., 264, *Department of Water Power* v. *Anderson,* 95 F. 2d 577), and this rule recently was extended to include the deliberations of an administrative board. (See *National Labor Relations Board* v. *Botany Mills,* 106 F. 2d 263.) But apart from the federal rule, if the rule in Kansas were to be applied, the

question of determining whether there had been a quotient verdict would be one entirely and alone for the determination of the trial court. (*Fitch* v. *State Highway*, 137 Kan. 584, 21 P. 2d 318, 103 A. L. R., 163: *Claggett* v. *Phillips*, 150 Kan. 191, 92 P. 2d 252.) The three jurors were permitted to testify at length and their testimony established beyond question that the verdict was properly arrived at and the quotient method was not used. Despite the fact that this evidence was clearly inadmissible, the court permitted petitioners to inquire of the jurors for the purpose of satisfying their own curiosity. The court's action indicated no bias or prejudice of any kind against either the United States or its counsel. The effort upon the part of the government's counsel to introduce this clearly inadmissible testimony upon the hearing of the motion for a new trial formed a part of what the judge concluded was "pettifogging."
[fol. 107] Petitioners complain of a colloquy between respondent and counsel for the government in open court in connection with the merits of a petition to set aside a written option in a pending action. The court frankly stated that it appeared that an unfair advantage had been taken of the petitioner (landowner) and that the option obtained was inequitable. The statement indicates neither prejudice in favor of the petitioner nor against the United States or its counsel.

A blanket charge consisting of conclusions, not of facts, that the respondent on various occasions wrongfully charged that the special attorneys for the Department were unfair, unjust, etc., are allegations of conclusions rather than facts, as was pointed out by the Circuit Court of Appeals in *Scott* v. *Beams*, supra, where the court said:

"Otherwise the affidavit abounded with general allegations of hostility of the court, abuse of witnesses and threats to have them incarcerated, and encouragement of attorneys for other litigants in their abuse of such witnesses; but these were conclusions, not statements of fact. For instance, one litigant might regard a statement or several statements of the presiding judge as constituting hostility, abuse of witnesses and threats of incarceration, and encouragement of counsel in their abuse of witnesses, while another litigant might regard such a statement or statements otherwise. Except the statement of the court in respect to the contract not

being public policy, the affidavit did not set out any statement of the court, either in direct language or in substance. It requires no elucidation to make plain that the affidavit fell far short and therefore it failed to comply with the requirement of the statute."

Were the affidavits filed in time?

This is a technical point and would not be considered if the affidavits were otherwise sufficient. Since they are not, it becomes the duty of the court to consider and analyze this question.

The statute provides that "every affidavit shall be filed not less than ten days before the beginning of the term of court, or good reason shall be shown for failure to file it within such time." The affidavits (in several cases) in question were handed to a deputy clerk of the court at Topeka, Kansas, in the first division of the court, at or about closing time of the office, on the 30th day of October, [fol. 108] 1942. At that time they were by the deputy marked "filed" although they were in cases pending in the third division of the court located at Fort Scott. The term of court commenced at Fort Scott at ten o'clock Monday morning, November 9, 1942. In Kansas there are three divisions of the court. The first division is located at Topeka, the second at Wichita and the third at Fort Scott. (28 U. S. C. A. Sec. 157.) The statute provides for terms of court at Fort Scott the first Monday in May and the second Monday in November. The second Monday of November, 1942, was November 9th. The affidavits could not have been received or filed in the Fort Scott office of the court until Monday, November 2d. The fact that the deputy in Topeka marked the affidavits "filed" did not constitute a filing of them in another division of the court. The cases in which the affidavits were filed were third division cases which had never been transferred from the third division to the first division "by stipulation of the parties or order of the court," as is required by the statute. The statute provides:

"Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial." (28 U. S. C. A. Sec. 119.)

In *Walsh & Wells* v. *City of Memphis*, D. C. Tenn. 1940, 32 F. Supp. 448, decided as late as April, 1940, it was held that:

"Consent of both parties is necessary to empower district judge to transfer a cause from one division of the district to another division, and such consent of parties must be evidenced by written stipulation filed of record."

No stipulation has ever been filed in these cases. The fact that the deputy clerk at Topeka was accom-odating and accepted such papers for transfer to Fort Scott was not a compliance with the statute requiring that the affidavits be filed "not less than ten days before the beginning of the term." Since the statute provides that the affidavits must be filed "not less than ten days before the beginning of the term" it necessarily follows that they must be filed in the division in which the case is pending ten days before the beginning of the term to be held in that division. Even if [fol. 109] depositing the affidavits in the Topeka office had been equivalent to filing them in the Fort Scott division, they were not so deposited ten full clear days before the beginning of the Fort Scott term, and there was in this respect a failure of compliance with the statute.

This question was discussed at some length in the case of Seawell v. Gifford, 22 Ida. 295, 125 Pac. 182, Ann. Cas. 1914A 1132, where a statute requiring candidates to file nomination papers "at least thirty days prior to the primary" was interpreted to mean that "at least thirty days must intervene between the date of the filing and the date of the primary." Papers filed on the 30th of June for a primary to be held on July 30 were held not in time. The court said:

"Said section of the statute provides that such papers must be filed at least 30 days prior to the primary election. Now, if such papers must be filed 30 days prior to the day of election, they cannot be legally filed within the 30 days next preceding the date of election. In other words, they must be filed 'without' that period, and not 'within' it. That is the reasonable construction of said statute; in fact, it is too plain to require construction. If an act must be done 30 days prior to a certain day, if it is done within that 30-day period, it certainly is not done 30 days prior to the commencement of such period."

The Kansas case, Garvin v. Jennerson, 20 Kan. 371, is to the same effect. It was there held:

"A deposition to be read on the trial of a case in the district court must be filed *at least* one day before the day of trial; and the statute means thereby, that one *clear* day must intervene between the filing of the deposition and the commencement of the trial at which it is to be read. To properly compute the time within said statute, both the day on which the deposition is filed, and the day of the trial, are to be excluded."

Under the rule announced in these decisions, these affidavits had to be filed on or before October 29th in the Fort Scott (third) division. Not having been so filed in the division wherein the cases are pending, they were not in time.

The facts are that the affidavits were considered and denied the morning of the first day of the term (November 9th), all other business of the court was transacted and the court adjourned at 3:00 p. m., until the following Monday, all within seven days after the affidavits could have been [fols. 110-117] received in the clerk's office at Fort Scott. Surely the statute means what it says; * * * "not less than ten days before the beginning of the term of court." These affidavits to be in time had to be filed on or prior to October 29th. Time is a matter of substance and not merely one of form. (*U. S.* v. *Parker*, 23 F. S. 880).

There is but one conclusion, which is that the affidavits are insufficient. Doubtless their filing will result in further delay. "Justice delayed is justice denied." The landowners are entitled to "just compensation." Unreasonable delay is depriving them of that just compensation to which they are entitled.

This court has no personal bias or prejudice against the government. In fact, it is strongly conscious of its feeling of reverence and respect for our great government. Such feeling, however, would not constitute a bias or prejudice against the landowner. This court has an abounding impatience toward waste in governmental affairs. It has an ever present and continuing consciousness that every man and woman in this country should be doing everything in their power in the war effort. It believes that the Kansas farmers who were evicted from their homes and farms

more than a year ago should not be further delayed in receiving their just compensation through tactics by counsel for the government.

An appropriate order may be drawn denying the affidavits as in all respects insufficient.

November 9, 1942.

(Here follows 3 photolithographs, side folios 118-120.)

EXHIBIT "H" - FILED DEC. 15, 1942

Office of the Attorney General
Washington, D.C.

December 7, 1942

Mr. Paul Aylward
Special Attorney
Department of Justice
302 Columbian Building
Topeka, Kansas

Dear Mr. Aylward:

On October 30, 1942, Mr. Norman M. Littell, Assistant Attorney General, authorized you by telephone to file an affidavit of bias and prejudice against Judge Richard J. Hopkins of the District Court for the District of Kansas pursuant to the provisions of 36 Stat. 1090, 28 U.S.C. sec. 25 in all condemnation cases pending in the District Court of Kansas.

Mr. Littell's action was taken pursuant to my approval and this is to confirm in every respect your action in filing the affidavit of bias and prejudice against Judge Hopkins.

Respectfully,

Attorney General

EXHIBIT "I" - FILED DEC. 15, 1942

Office of the Attorney General
Washington, D.C.

December 5, 1942

Mr. Paul L. Aylward,
Special Attorney,
Department of Justice,
302 Columbian Building,
Topeka, Kansas.

Dear Mr. Aylward:

This letter will confirm the instructions and directions given you by telephone on Sunday, November 15, 1942, to proceed with the filing in the Circuit Court of Appeals for the Tenth Circuit of a petition for writ of mandamus or, in the alternative, a writ of prohibition from the orders of November 9, 1942 of the Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, denying the affidavits of personal bias and prejudice filed by you in civil actions Nos. 1233, 1246, 1243 and 1262, pending in his Court.

Sincerely,

Francis Biddle

Attorney General.

EXHIBIT "J" - FILED DEC. 15, 1942

STANDARD TIME INDICATED

RECEIVED AT

(25)..

TELEPHONE YOUR TELEGRAMS TO POSTAL TELEGRAPH

Postal Telegraph

THIS IS A FULL RATE TELEGRAM, CABLEGRAM OR RADIOGRAM UNLESS OTHERWISE INDICATED BY SYMBOL IN THE PREAMBLE OR IN THE ADDRESS OF THE MESSAGE. SYMBOLS DESIGNATING SERVICE SELECTION ARE OUTLINED IN THE COMPANY'S TARIFFS ON FILE AT EACH OFFICE AND ON FILE WITH REGULATORY AUTHORITIES.

Form M

K112. K.CB214 C.NC382 N.WC114 LF92W 28 NL GOVT=PDJ WASHINGTON DC 7

PAUL AYLWARD SPECIAL ATTY=
302 COLUMBIAN BLDG (TOPEKA KANS)=

RE YOUR LETTER NOVEMBER 5 YOU ARE AUTHORIZED TO FILE AFFIDAVITS OF PREJUDICE IN ALL CASES TO BE TRIED BY HOPKINS NOTIFY DEPARTMENT IMMEDIATELY RESULTS OF HEARING MONDAY=

NORMAN M LITTELL ASSISTANT ATTORNEY GENERAL.

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46C

[fol. 121] EXHIBIT "K"—FILED DEC. 15, 1942

(File Endorsement Omitted.)

First Division

Civil Action No.	Total Number Acres	No. Appeals Pending	No. Tracts Pending
* 4595	16,438	81	97
* 4597	5,185	20	27
* 4602	679	1	2
* 4623	160	1	1
* 4626	741	1	4
* 4649	730	..	1
* 4655	37	..	1
* 4661	323	..	1
* 4638	1	..	4
4622	ease.	..	1
* 4615	86	1	6
* 4690	1,864	6	8
* 4703	1,442	1	4
* 4704	132	..	1
* 4706	20	2	3
* 4708	9,080	15	33
4712	45,128	..	54
4717	ease.	..	1
* 4718	240	2	2
4721	640	..	1
4727	ease.	..	3
4729	.....	..	1
4730	620	..	6
4731	.....	..	2
4735	.....	..	3
4736	160	..	1
4741	13	..	1
4742	3,032	..	5 approx.
4744	ease.	..	350 "
4745	1,830	..	12
4747	1,840	..	15
4749	480	..	4 approx.
4750	145	..	2
4751	199	..	2
4754	1,570	..	20 approx.
4755	22	..	2
36	92,837	131	681
4663	960	..	..
4603	16	..	..
4640	.....	..	..

* Report of Appraisers filed.

[fol. 121a] Second Division

Civil Action No.	Total Number Acres	No. Appeals Pending	No. Tracts Pending
* 2034	2,282	5	5
* 2038	1,715	..	2
* 2042	592	4	7
2044	240	..	1
2055	1,626	..	7
2057	2,520	..	9
2060	2,565	..	22
2061	1,440	..	7
2063	1,119	..	8
2068	2,000	..	19
2069	642	..	6
2072	.....	..	17 approx.
2074	2,388	..	4
2075	ease.	..	20
14	19,129	9	134

* Report of Appraisers filed.

[fol. 121b] Third Division

Civil Action No.	Total Number Acres	No. Appeals Pending	No. Tracts Pending
* 1233	16,000	26	42
* 1246	310	2	2
* 1277	5	..	3
* 1273	70	..	1
* 1243	1,887	1	5
* 1248	111	..	4
* 1253	53	..	1
* 1262	233	..	2
* 1276	1,440	7	7
1279	1,433	..	13
1289	150	..	1
1291	446	..	11
1292	880	..	2
1293	16	..	3
1295	640	..	1
1296	502	..	2
1297	11	..	1
17	24,187	36	101
1275	160	..	..

* Report of Appraisers filed.

Checked with the Court records as to First and Third Divisions and found correct as to number of appeals peniding in those divisions.

Thomas M. Lillard
Attorney for Richard J. Hopkins,
Respondent.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—December 15, 1942

Forty-ninth Day, September Term, Tuesday, December 15th, A. D. 1942. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on petition for a writ of mandamus or in the alternative for a writ of prohibition, Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, special attorneys for the Department of Justice, appearing for petitioner; Howard Fleeson, Austin M. Cowan and Wayne Coulson appearing for respondent.

Thereupon, the parties announced themselves ready for trial and the petitioner offered in evidence Exhibits A to K, which were admitted on oral stipulation of the parties without objection.

Whereupon, no further evidence being introduced, the parties rested and proceeded to argue said cause.

The court being duly advised and having considered the evidence and argument of counsel, finds: First, that the affidavit of personal bias and prejudice involved in this action is legally sufficient under the statute; and, Second, that the facts justify the issuance of an extraordinary writ of mandamus or writ of prohibition.

Wherefore, it is considered, ordered, adjudged and decreed by the court that a permanent writ of mandamus issue pursuant to the prayer of the petitioner, from which Judge Phillips respectfully dissents on the grounds that the facts and circumstances presented do not warrant the granting of the extraordinary remedy.

On application of respondent, it is further ordered that the issuance of the permanent writ of mandamus be stayed [fols. 123-125] for a period of forty-five days from this date, and if within said period of forty-five days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof, under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

CLERK'S CERTIFICATE

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the above and foregoing as full, true, and complete copies of all pleadings, record entries, and proceedings (except full captions, titles, and endorsements omitted pursuant to the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2648, wherein United States of America was petitioner, and Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, was respondent; as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 6th day of January, A. D. 1943.

Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals, Tenth Circuit, by George A. Pease, Deputy Clerk. [Seal.]

[fol. 127] IN THE UNITED STATES SUPREME COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF PRINTED RECORD

The parties hereto, by and through their counsel of record, hereby stipulate and agree that the printed transcript of the record shall consist of the following:

1. Motion for leave to file petition for issuance of writ of mandamus (R. 1).

2. Order granting leave for filing petition for issuance of writ of mandamus (R. 2).

3. Petition for issuance of writ of mandamus (R. 3).

Exhibit A, Affidavit of personal bias and Prejudice and application dated October 30, 1942 (R. 8);

Exhibit B, A statement that that portion of Exhibit B down to and including subparagraph g, is identical with the similarly designated portions of Exhibit A except for caption. Print the remainder of Exhibit B (R. 20).

4. Motion to dismiss (R. 59).

[fol. 128] 5. Order denying the motion to dismiss (R. 81).

6. Response and answer (R. 82).

7. Memorandum opinion of Honorable Richard J. Hopkins, United States District Judge, filed in Nos. 1233-1246-1262, United States of America v. 16,000 Acres of Land, more or less, in Labette County, Kansas, et al. (R. 92).

8. Exhibits admitted at hearing in United States Circuit Court of Appeals: Exhibit H (R. 118), Exhibit I (R. 119), Exhibit J (R. 120), Exhibit K (R. 121).

9. Judgment (R. 122).

10. Clerk's certificate (R. 126).

Howard T. Fleeson, Austin M. Cowan, Wayne Coulson, T. M. Lillard, Fred Robertson, Attorneys for Petitioner. Charles Fahy, Solicitor General, Attorneys for Respondent.

No. 765

IN THE

Supreme Court of the United States

October Term, 1942.

RICHARD J. HOPKINS, Judge of the United States District Court for the District of Kansas, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

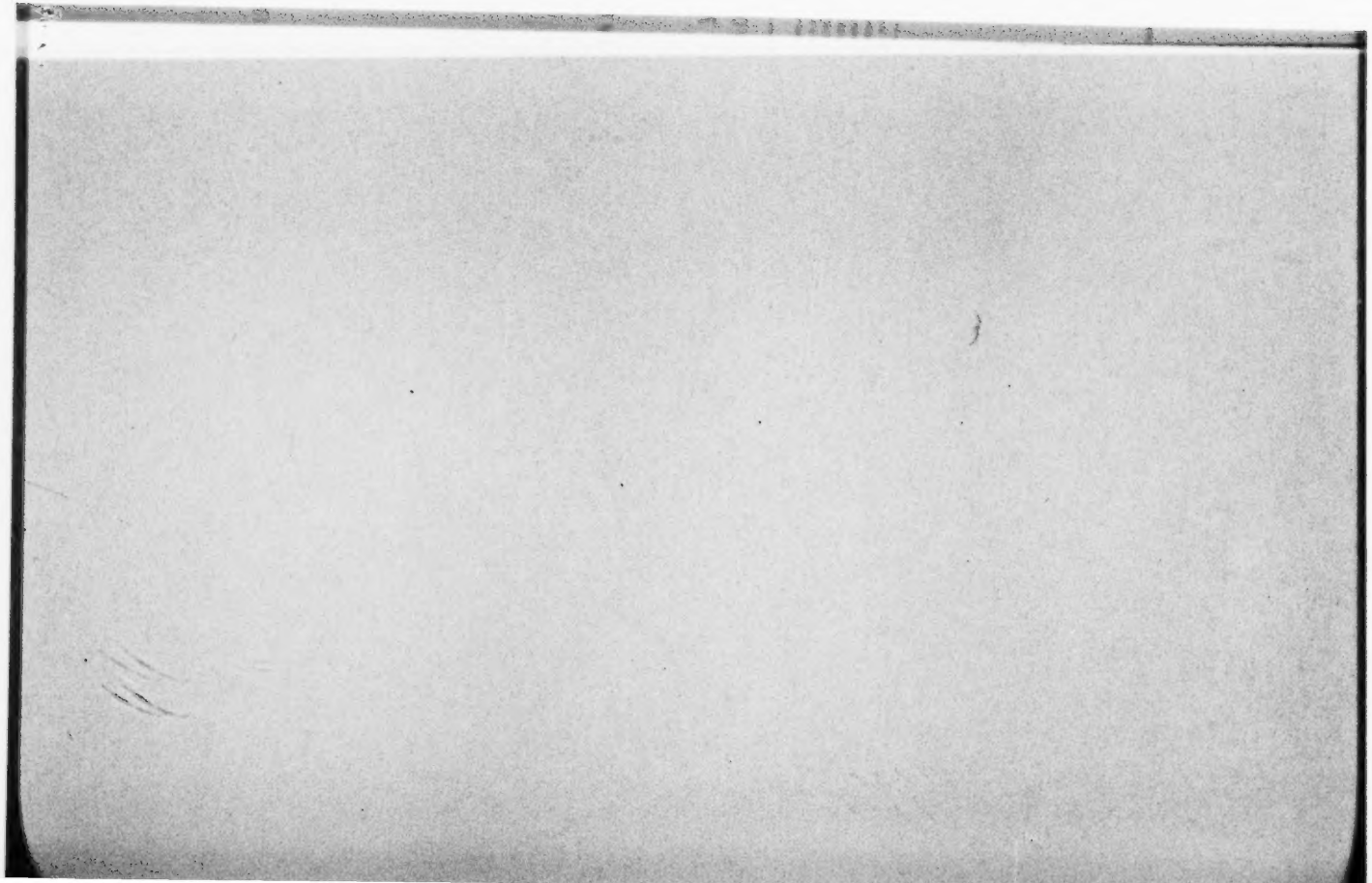
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

HOWARD T. FLEESON,
AUSTIN M. COWAN,
WAYNE COULSON,
Of Wichita, Kansas;

T. M. LILLARD,
Of Topeka, Kansas;

FRED ROBERTSON,
Of Kansas City, Kansas,
Attorneys for Petitioner.

McGUIN PUBLISHING CO., WICHITA



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IN THE

Supreme Court of the United States

October Term, 1942.

No._____.

RICHARD J. HOPKINS, Judge of the United States District Court for the District of Kansas, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, Richard J. Hopkins, United States District Judge for the District of Kansas, respectfully shows to the Court:

I.
SUMMARY OF THE MATTER INVOLVED.

This action concerns the sufficiency of affidavits of bias and prejudice filed by Special Attorneys for the Department of Justice in actions for the condemnation of land for military purposes pending in the United

States District Court for the District of Kansas. The petitioner, Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, to avoid the demands upon the time of farmer jurors, expedite the disposal of the cases and save expense, urged the Special Attorneys for the Department of Justice to waive jury trial of approximately 255 appeals by the United States from awards of appraisers, many of whom had been appointed upon the recommendation of the Special Attorneys for the Department of Justice. (R. 3, 7, 8, 9, 22.) His criticism of and comments upon the contrary course of proceeding decided upon by these Special Attorneys and certain adverse rulings in the trial of the cases (to a jury) resulted in the filing of the affidavits of bias and prejudice set out on pages 5 to 18 of the record.

The petitioner held the affidavits to be legally insufficient and refused to recuse himself for the reasons stated in his memorandum opinion set out on pages 28 to 46 of the record.

The present action was then filed by the respondent, United States of America, as an original action in the United States Circuit Court of Appeals for the Tenth Circuit, seeking a writ of mandamus or, in the alternative, of prohibition directing petitioner to disqualify himself. (R. 2-5.) By a divided court, and without a written opinion, the affidavits were held sufficient and judgment directing the issuance of the writ of mandamus was entered. (R. 49.) The Senior Circuit Judge dissented "on the grounds that the facts and circumstances presented do not warrant the granting of the extraordinary writ." (R. 49.)

The petition for a writ of mandamus or of prohibition filed in the Circuit Court of Appeals by the respondent, United States of America, alleged in substance:

> On October 30, 1942, identical affidavits of bias and prejudice were filed by the United States in four cases pending in the Third Division of the United States District Court for the District of Kansas, a copy of such affidavits being attached to the petition as Exhibit A. (R. 2.) On November 9, 1942, being the opening day of the term, petitioner, as judge of said court, determined that the affidavits and applications were insufficient and denied the applications. (R. 3.)
>
> The four cases are actions by the United States for the condemnation for military purposes of lands located within the State of Kansas. In each case appeals have been filed by the United States and by landowners from awards of appraisers appointed by the court. Such appeals involve approximately forty tracts of land and the parties are entitled to separate jury trials as to each tract. (R. 3.)
>
> There are pending in said court approximately seventy-five separate actions by the United States for the condemnation of lands for military purposes, involving approximately 869 tracts of land and in which there are pending approximately 255 separate appeals by the United States from awards made by appraisers. On November 9, 1942, identical affidavits of bias and prejudice were filed by the United States in five additional cases, a copy of the affidavits being attached to the petition as Exhibit B. The United States intends to file affidavits of bias and prejudice in all of such cases, in many of which

no action has yet been taken by said judge and in others of which awards have not yet been filed by appraisers. (R. 3.)

The affidavits of bias and prejudice filed by the United States were filed in good faith, are sufficient in law and the applications should have been granted. (R. 4.)

The circumstances demand a departure from the ordinary remedy by appeal and require mandamus or prohibition by reason of the number of appeals and other matters pending in said causes, the large amount of money involved and the number of landowners and other persons involved. The parties to said causes will be put to a great expenditure of time and money occasioned by separate trials wherein any decision against the United States will be defective for want of power of Judge Hopkins to proceed further in said causes and wherein a multiplicity of appeals to the Circuit Court of Appeals will be necessary to enable the United States to obtain a fair, impartial and unbiased court in which to try the many pending cases. (R. 4.)

The affidavits of bias and prejudice attached to the petion as Exhibits A and B are made by Paul L. Aylward, Peter F. Caldwell and Jacob A. Dickinson, who state in the affidavits that they are special attorneys of the Department of Justice and attorneys of record for the United States and that they are authorized to and do make the affidavit on behalf of the United States, a party to the action. (R. 6.) The same three men, as attorneys of record for the United States, certify that their own affidavit is made in good faith. (R. 14, 18.)

The charge in the affidavits of bias and prejudice is that Richard J. Hopkins, District Judge, "has a personal bias and prejudice against the United States of America and in favor of the defendants and opposite parties named in the above entitled action." (R. 6.) The affidavits do not name any of the defendants in whose favor the judge is alleged to be prejudiced (several hundred persons under the allegations of the petition R. 3) and the reasons stated in the affidavit for the belief that bias and prejudice exist relate only to prejudice against the United States, or, more accurately, against the tactics of its counsel. The grounds for belief that bias and prejudice exist are the same in both affidavits except for subdivision (h), which appears only in Exhibit B. (R. 15.) In a condensed form the grounds stated in the affidavit are the following:

(a) Petitioner endeavored to persuade counsel for the United States to waive jury trials of the appeals from awards of appraisers for the stated reason that they would call for an unwarranted expense of money and time of farmers who are badly needed to take care of their crops to help the government. (R. 6, 7.)

> Note: The affidavit does not state that a jury trial was denied in any case. In subdivision (b) of the affidavit it appears that the trials were had to a jury. (R. 7.) The jury cases mentioned in subdivision (b) were the only cases tried.

(b) In the trial of the appeals before petitioner in Topeka, Kansas, petitioner overruled respondent's motion to have the jury view the land involved, stating that apparently some departments of the government had not discovered that the country was in a war, that the money required to take the jury to view the land (seventy-five

miles distant) could be better used for munitions, that the jury could form a reasonable estimate of the value from the testimony and that the request was unreasonable under the circumstances confronting the country. (R. 7, 8.)

> Note: The matter of whether the land should be viewed by the jury was one resting in the discretion of the court. *Coughlen v. Chicago I. & K. Ry. Co.*, 36 Kan. 422, 13 P. 813; *United States v. Meyer*, 7 Cir., 113 F. 2d 387.

(c) In overruling respondent's motion for a new trial of a condemnation appeal, the court stated that counsel for the United States had apparently not discovered that a war was on and that the expense and time of farmer jurors incident to a jury trial was unwarranted. (R. 8, 9.)

(d) In the presentation by counsel for the United States of a motion for a new trial it was argued that a remark of the Court during the trial of the case was in effect an accusation that the government was trying to cover up material evidence relating to land values. The Court answered, "As a matter of fact, you were, weren't you?" (R. 9, 10.)

(e) Following the hearing of a motion for a new trial in the Topeka cases and in the corridor outside the courtroom petitioner stated to one of counsel for the United States, "You are a pettifogger. You have been pettifogging for two hours and a half." (R. 10.)

(f) On the hearing of a motion for a new trial in the Topeka cases, counsel for the United States interrogated three of the jurors who had sat in the case, in an effort to impeach the verdict. During a recess prior to the calling of the jurors as witnesses by counsel for the

United States, petitioner talked to the jurors in his chambers. (R. 11, 12.)

> Note: The testimony of the jurors was inadmissible to impeach their verdict. *McDonald v. Pless*, 238 U. S. 264, 59 L. Ed. 1300, 35 S. Ct. 783; *Department of Water Power v. Anderson*, 9 Cir., 95 F. 2d 577, cert. den. 305 U. S. 607, 83 L. Ed. 386, 59 S. Ct. 67. However, petitioner permitted their interrogation at length to satisfy counsel for respondent. (R. 11.)

(g) In a hearing in another land condemnation case, in which a landowner sought to set aside an option given to the United States and the subsequent appraisal was at the option price as to this particular tract but at a higher rate on other adjacent tracts, petitioner suggested to counsel of the United States that it might be equitable for the land to be reappraised at its true value and that it would be inequitable for the United States to take this land at a price lower than that which the farmer would be compelled to pay to replace it with similar land. (R. 12, 13.)

(h) At a hearing in a condemnation case involving the apportionment between a landlord and a tenant, petioner stated, "The Government better see about this," and at another time in the course of the same hearing petitioner stated, "I think the Government better reconsider and make a settlement with these people. I am suggesting the government better consider this matter carefully and do justice to these people that it throws off these farms." (R. 15, 16.)

The real complaint in the affidavits is the court's insistence that the demand of counsel for the United States for a jury trial of all the 255 appeals was unreasonable and unwarranted under the conditions confronting the

country because of the time required of farmer jurors, whose services on the farm were vital to the war effort, the delay in disposing of the cases which would necessarily result from jury trials and the huge expense incident to so many jury trials. (Subdivisions (a) and (c) R. 6, 8.) Petitioner's insistence that juries be waived was in accord with the resolution of Circuit Judge John J. Parker recently adopted by the House of Delegates of the American Bar Association. 28 *American Bar Assn. Journal,* 697, October, 1942.

The matters relied upon as showing bias and prejudice all arose out of judicial proceedings but none of them would justify a reversal of the judgment in the cases in which the various matters took place.

NOTE: No appeals were taken in the cases in which the comments and rulings alleged to show bias and prejudice were made and the time for appeal has expired.

II.
THE QUESTIONS INVOLVED.

The answer of petitioner in the court below raises the following questions of law:

1. Whether the affidavits of bias and prejudice, summarized above, are legally sufficient to show personal bias and prejudice as such terms are used in 28 U. S. C., sec. 25, upon the part of petitioner either in favor of the unnamed landowners or against the United States. (R. 27.)

2. Whether the circumstances pleaded disclose a situation so rare and exceptional as to justify the extraordinary remedy of mandamus. (R. 21, 22.)

3. Whether the affidavits in the cases pending in the Third Division (the only affidavits passed upon by petitioner, R. 2, 3) were timely filed. (R. 20.)

4. Whether the affidavits were made by a party to the action as required by 28 U. S. C., sec. 25.

5. Whether a certificate of counsel of record that an affidavit of bias and prejudice sworn to by themselves was filed in good faith is a sufficient compliance with 28 U. S. C., sec. 25.

III.
JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U. S. C., sec. 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered December 15, 1942. (R. 49.) The date of this petition for certiorari is February 14, 1943.

IV.
REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The only bias and prejudice mentioned in 28 U. S. C., sec. 25, is *personal* bias and prejudice. Such bias and prejudice cannot be limited to a type or class of actions but must be general to come within the meaning of the word "personal." The charge that a United States District Judge has a personal bias and prejudice against the United States of America, whose servant he is and in whose armed forces his only sons are serving (R. 27) (one of whom has died in that service since the filing of the affidavits of bias and prejudice), is so serious and extraordinary as to merit the consideration and determination by this court of the legal sufficiency of the charge.

2. The questions raised by the present case are of national importance because they involve the independence of the judiciary. If the judgment of the Circuit Court of Appeals, that adverse discretionary rulings and

criticism of the tactics of counsel in judicial proceedings are a sufficient basis for disqualification of a judge upon the ground that he has a personal bias and prejudice against a party within the meaning of 28 U. S. C., sec. 25, is followed, the control by Federal trial judges over the proceedings in their courts as it has heretofore existed is at an end. The judge will, at best, occupy the position of an arbitrator or umpire, subject to removal at the will of either party. If such a revolutionary change in the Federal judiciary is to be made, it should only be made after it has received the consideration of this court.

3. Since no opinion was written by the Circuit Court of Appeals we do not know which of the reasons stated in the affidavit for belief that petitioner has a personal bias and prejudice against the United States were held by it to be legally sufficient. We therefore proceed upon the theory that the court held all of the grounds sufficient. Not a single one of the reasons stated could have been held to be legally sufficient without that holding conflicting with the decisions of one or more of the other Circuit Courts of Appeals.

(a) In holding that personal bias and prejudice upon the part of a judge may be predicated upon his statement of conclusions based upon judicial proceedings before him, the decision is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Craven v. United States,* 22 F. 2d 605, cert. den. 276 U. S. 627, 72 L. Ed. 739, 48 S. Ct. 321, with the decision of the Circuit Court Appeals for the Eighth Circuit in the case of *Ryan v. United States,* 8 Cir., 99 F. 2d 864, cert. den. 306 U. S. 635, 83 L. Ed. 1037, 59 S. Ct. 484, and with the decision of the Circuit Court of Appeals for the Third Circuit in *National Labor Relations*

Board v. Baldwin Locomotive Works, 3 Cir., 128 F. 2d 39 (at p. 57). (It is also in conflict with the court's own decision in *Scott v. Beams,* 10 Cir., 122 F. 2d 777, cert. den. 315 U. S. 809, 86 L. Ed. 1209, 62 S. Ct. 795, where the trial judge in the course of the trial abused the parties and their counsel, called testimony perjury and threatened prosecution for perjury.)

(b) In holding that a charge of personal bias and prejudice upon the part of a judge may be predicated upon judicial rulings in prior trials of like character, the decision is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *Sacramento Suburban Fruit Lands Co. v. Tatham,* 9 Cir., 40 F. 2d 894, cert. den. 282 U. S. 874, 75 L. Ed. 772, 51 S. Ct. 79, and *Walker v. United States,* 9 Cir., 116 F. 2d 458, with the decisions of the Circuit Court of Appeals for the Eighth Circuit in *Ryan v. United States,* 8 Cir., 99 F. 2d 864, cert. den. 306 U. S. 635, 83 L. Ed. 1037, 59 S. Ct. 484, and *Minnesota & Ontario Paper Co. v. Molyneaux,* 8 Cir., 70 F. 2d 545, and with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Morse v. Lewis,* 4 Cir., 54 F. 2d 1027, cert. den. 286 U. S. 557, 76 L. Ed. 1291, 52 S. Ct. 640.

(c) In holding that personal bias and prejudice may be predicated upon irritation upon the part of a judge at the tactics adopted by counsel for a litigant in judicial proceedings, the decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Refior v. Lansing Drop Forge Co.,* 6 Cir., 124 F. 2d 440, cert. den. 316 U. S. 671, 86 L. Ed. 1746, 62 S. Ct. 1047.

(d) In holding that prejudice against a class or type of cases is personal bias and prejudice against a party, the decision is in conflict with the decision of the Circuit

Court of Appeals for the Ninth Circuit in *Price v. Johnston,* 9 Cir., 125 F. 2d 806, cert. den. 316 U. S. 677, 86 L. Ed. 1750, 62 S. Ct. 1106.

(e) In holding that personal bias and prejudice may be founded upon adverse judicial rulings, the decision is probably in conflict with the decision of this court in *Ex parte American Steel Barrel Company,* 230 U. S. 35, 57 L. Ed. 1379, 33 S. Ct. 1007.

4. In holding that the pleaded circumstances, to-wit, large amount of money involved, numerous parties, multiplicity of probable appeals, are so rare and exceptional as to justify the extraordinary writ of mandamus, the decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Minnesota & Ontario Paper Co. v. Molyneaux,* 8 Cir., 70 F. 2d 545, and with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *In re Lisman,* 2 Cir., 89 F. 2d 898.

5. In holding that an affidavit made by counsel of record, who then certify that their own affidavit is made in good faith, is a sufficient compliance with the requirements of 28 U. S. C., sec. 25, the decision is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Beland v. United States,* 5 Cir., 117 F. 2d 958, cert. den. 313 U. S. 585, 85 L. Ed. 1541, 61 S. Ct. 1110, and *Anchor Grain Co. v. Smith,* 5 Cir., 297 F. 204, and with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Cuddy v. Otis,* 8 Cir., 33 F. 2d 577.

6. In holding that the affidavit, which was not filed at least ten days before the beginning of the term and which did not state any reason for its being filed out of time, was timely filed, the decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth

Circuit in *Shea v. United States,* 6 Cir., 251 F. 433, cert. den. 248 U. S. 581, 63 L. Ed. 431, 39 S. Ct. 132, with the decisions of the Circuit Court of Appeals for the Eighth Circuit in the cases of *Bishop v. United States,* 8 Cir., 16 F. 2d 410, *Rossi v. United States,* 8 Cir., 16 F. 2d 712, *Bommarito v. United States,* 8 Cir., 61 F. 2d 355, and with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Bowles v. United States,* 4 Cir., 50 F. 2d 848, cert. den. 284 U. S. 648, 76 L. Ed. 550, 52 S. Ct. 29.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of said Court of Appeals in this case, which was entitled in that court "In the Matter of the Application of the United States of America for a Writ of Mandamus, or, in the Alternative, for a Writ of Prohibition Against the Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas," to the end that said cause may be reviewed and determined by this court as provided by law, and that the judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

HOWARD T. FLEESON,
AUSTIN M. COWAN,
WAYNE COULSON,
Of Wichita, Kansas;
T. M. LILLARD,
Of Topeka, Kansas;
FRED ROBERTSON,
Of Kansas City, Kansas,
Attorneys for Petitioner.

APPENDIX.

The applicable statute, 25 U. S. C., sec. 25, provides:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 765

RICHARD J. HOPKINS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court holding the affidavits of bias and prejudice to be insufficient (R. 28–46) is not reported. The judgment of the circuit court of appeals directing petitioner to proceed no further in the trial of cases where affidavits had been filed (R. 49) was entered without opinion.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered December 15,

1942 (R. 49). The petition for a writ of certiorari was filed on February 25, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the affidavits of bias and prejudice filed by government counsel against petitioner complied with the requirements of Section 21 of the Judicial Code.

2. Whether the Government's petition in the circuit court of appeals presented facts warranting the issuance of a writ of mandamus.

STATUTE INVOLVED

Section 21 of the Judicial Code (28 U. S. C. 25) is quoted in full in the Argument, *infra*, p. 8.

STATEMENT

During the past three years the United States has condemned a vast quantity of land in Kansas for defense and war purposes (R. 29, 47–48). In determining just compensation for this land the Government follows the practice and procedure prescribed by the laws of Kansas. Act of August 1, 1888, sec. 2, 25 Stat. 357 (40 U. S. C. 258). Under Kansas practice value is first determined by three appraisers, appointed by the court, who "view and appraise" the property. Kan. Gen. Stat. Ann. (Corrick, 1935) sec. 26–101. From their awards either party has an absolute

right to a trial *de novo* before a jury. (*Ibid.*, sec. 26–102.)

Since a trial *de novo* is certain to follow if either party is dissatisfied, it has become the general practice of both the Government and the landowners in Kansas, and in many other states where trials *de novo* are a matter of rigth, to pay little heed to the proceedings of the commissioners or appraisers and concentrating on the trial before a jury, thus avoiding the expense of two complete trials.[1] And experience derived by Department of Justice officials from the condemnation of vast quantities of land during the past ten years has shown that as a rule verdicts returned by juries are lower than those returned by courts or commissioners.

Accordingly, it has been the Government's practice in Kansas, whenever the appraisers' awards are greatly in excess of the estimates made by the acquiring officer (Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a), to ask for a valuation trial before a jury. Petitioner has strenuously opposed this policy, using considerable pressure to induce government counsel to accept the appraisers' awards (even though unsatisfactory to the acquiring agency and even though arrived at

[1] In fact, the Department of Justice is at present sponsoring legislation eliminating commissioners, appraisers, and assessors in federal condemnation proceedings and providing for a single trial before a court or jury, in order to expedite payment for land acquired during the war period. See H. Rep. 2289, 77th Cong., 2d sess., pp. 1–3.

without submission of any evidence). And where, over his opposition, the Government has insisted on its right to a trial *de novo,* petitioner has endeavored to "badger" counsel into dispensing with juries (see R. 7).[2] The Department of Justice, pursuant to its general policy and believing that petitioner has an exaggerated concept of the value of Kansas real estate, has insisted on jury trials, with the result that its field attorneys handling condemnation matters in Kansas have become *persona non grata.* Believing that petitioner was determined to "convince" the Government of the inadvisability of insisting on jury trials, the special attorneys for the Lands Division of the Department were instructed to file affidavits of bias and prejudice in cases about to be tried before him (R. 46–A.)

Affidavits were accordingly filed on October 30, 1942, in four suits (Civil Nos. 1233, 1243, 1246, and 1262) then pending in petitioner's court and scheduled for trial on November 9. In these

[2] Petitioner advances patriotic motives in support of his opposition to jury trials, contending that jurymen were needed on the farms (R. 29–30). But the trials in question were to be held in the latter part of October and in November, a slack period in a grain-belt area like Kansas. Since there is only one federal district judge for the entire state of Kansas, there would only be one federal jury sitting at any one time in that state. And it is the general practice in federal condemnation proceedings to use the same jury to evaluate the different parcels involved in a particular taking. Hence, it does not appear that the Government's insistence upon a jury trial will seriously interfere with farming operations in the State of Kansas.

affidavits the following facts and reasons were alleged in support of the belief that petitioner was biased and prejudiced: that he had attempted to coerce the Government into abandoning its policy of jury trials in condemnation cases, to the point of refusing to proceed with jury cases (R. 6–7); that he had accused the Department of Justice of "unfair tactics" in insisting upon an admitted right to a jury trial (R. 7); that he had characterized jury trials as "an unwarranted expense of money" (R. 7–9), although well knowing that the awards of court appraisers had been sizeably reduced by juries in companion cases, such reductions redounding to the benefit of the general taxpaying public (R. 9); that he had accused "some departments of the Government" (including the Justice and War Departments which were actively engaged in acquiring the lands in question for war purposes) of not knowing that a war is going on (R. 7, 8); that he had charged government counsel with trying to cover up facts with regard to land values (R. 9–10), a charge which the latter categorically denied (R. 10); that he had called government counsel a "pettifogger" (R. 10); that he had frustrated an attempt by the Government to show that a "quotient verdict" had been returned in a particular case by adjourning court and surreptitiously questioning members of the jury in chambers out of the presence of a court reporter and government counsel (R. 10–11); that he favored Kansas

property owners rather than the general taxpaying public in all valuation matters (see R. 7, 12–13, 15–16).

Nothwithstanding the mandatory language of Congress that upon the filing of an affidavit stating the facts and reason for the belief of personal bias and prejudice, "such judge shall proceed no further" (28 U. S. C. 25), petitioner examined the affidavits at length (R. 28–46) and on November 9, 1942, declined to recuse himself (R. 46). Since petitioner notified counsel that he proposed to proceed with the trial of these cases on Monday, November 16, the Government applied to the circuit court of appeals for a writ of mandamus or, in the alternative, for a writ of prohibition commanding petitioner to proceed no further (R. 1). In support of its petition, the Government pointed out that a great number of condemnation cases were pending in Kansas, involving large amounts of money and numerous landowners; that if these cases were tried before petitioner and the affidavits of bias and prejudice were subsequently sustained on appeal, the retrial of all cases heard in the interim would result in a multiplicity of appeals and a needless expenditure of time and money (R. 3–4).

Circuit Judge Bratton on Sunday, November 15, 1942, entered an order granting the Government leave to file a petition for mandamus and ordered the district judge to show cause why the writ should not be granted (R. 1–2). When the

matter came on for hearing before the circuit court of appeals on November 20, petitioner moved to dismiss the Government's petition on various grounds (R. 18–19). The court below denied the motion but allowed him fifteen days in which to file a "response" (R. 19). The matter came on for further hearing on December 15, 1942, at which time the Government introduced affidavits in support of its petition and in refutation of certain charges that the proceedings in question had not been authorized by the Attorney General (R. 46A–48). The court thereupon entered judgment granting the Government a writ of mandamus (R. 49). All three judges agreed that the affidavits were legally sufficient under the statute, Judge Phillips dissenting on the sole ground that the facts and circumstances did not warrant the granting of this remedy (R. 49).

ARGUMENT

Petitioner makes two primary contentions: (1) that the affidavits of bias and prejudice were legally insufficient (Pet. 8–12); and (2) that the facts stated in the petition for mandamus did not justify the issuance of the writ (Pet. 8, 12).

1. The disqualification of a federal judge for personal bias or prejudice and the substitution of another judge in his place is governed by section 21 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1090, 28 U. S. C. 25) which provides:

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> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

The scope and purpose of this provision may best be determined by examining its legislative history. It was inserted during the debates on the Judicial Code of 1911 after Representative

Cullop of Indiana, its author, had expressed the belief on the floor of the House that Section 20, providing for the disqualification of judges for interest or relationship, was too narrow, that it should be broadened to include other grounds, and that the matter of qualification or disqualification should not be left to the judge himself for determination (46 Cong. Rec. 306):

> *When a charge is made against the qualification of any judge that he is biased, that he is taking sides one way or the other, that question ought not to be left to him to be passed upon.* Judges are heirs to the same frailties that other men are, and they ought not to be required to pass upon and decide questions personal to themselves, and as a delicate question they ought not to want to pass upon such a question as that. But by law it should be taken away from them and the venue of the cause changed. *It should be made mandatory on this question.* I am going to ask the chairman for permission for a section to be added to section 20, or an amendment be added thereto, so that a party upon assigning a specific reason for a change of a judge in the trial of the cause the same *shall be changed.* * * * It is just as sacred that litigants should have a fair trial in court as it is for a judge to preside at the trial and conduct the business of the courts, and the litigant ought to have the opportunity to have his case tried before a court that he *believes* to be fair and impartial. It is un-

fair to litigants to be compelled to come at any time before a court where they think they cannot have a fair trial. It is a reproach to the administration of justice to require them to do so. It is for this reason that I want to offer an amendment to this section, that either party to a suit, other than one brought by the Government,[3] may file his affidavit stating the cause for which he desires a change of venue. Many of the States have this practice, and it is found to be a wholesome one. Litigants as a rule do not want to delay the courts; but courts had better be delayed, and the disposition of the business in them had better be delayed, than to require any man to submit his case to a court for trial before a judge in whom he has not full confidence in his fairness and impartiality. * * * the party asking a change of venue, presenting a cause provided for by statute, ought to be permitted by the law to have a change of venue, and the judge ought to be required by the law to give it when it is asked. I am going to ask permission to add an amendment defining the causes and conditions under which a change of venue shall be granted, and so as to bring that question before the House I am going to ask unanimous consent to have time in which to prepare a provision covering that subject and present it to the House. I can conceive no

[3] As is explained *infra*, p. 19, Section 21 as finally enacted contained no such limitation.

> greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly. [Italics supplied.]

As a result of this discussion, Representative Cullop succeeded in persuading the House Judiciary Committee to approve an additional Section (sec. 20a), the language being substantially that of the present Section 21. 46 Cong. Rec. 2626. In the ensuing debates on the floor of the House, the purpose and scope of this new provision were explained by Mr. Cullop, its sponsor, as follows (46 Cong. Rec. 2626–2627):

> Mr. CULLOP. * * * The section that is proposed as section 20a provides that, on the litigant filing the proper affidavit stating the fact that the judge is biased or prejudiced in the case, he shall proceed no further and another judge shall be called under the provisions of the act, as provided in other cases, who shall hear and determine the case. The affidavit shall state the reasons for the belief that the applicant has for the bias or prejudice of the judge. * * *

Mr. Cox of Indiana. I am partly in favor of the gentleman's amendment, but does he believe that his amendment will accomplish what he is driving at? In other words, *if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the court?*

Mr. CULLOP. *No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.*

Mr. Cox of Indiana. But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, *does it not leave it to the discretion of the judge?*

Mr. CULLOP. *No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him.* It does not say that he shall state the facts, but the reasons for the belief that he has that the judge is biased or prejudiced in the case.[4]

Now, this amendment is very essential, in my judgment, for the protection of the

[4] As subsequently amended, the statute requires the affidavit to contain a statement of both the facts and the reasons for the belief that the judge is biased or prejudiced.

courts from criticism. As the matter now stands, a litigant in court has no recourse for relief from the trial judge, but he must submit his case, sometimes feeling, as he may, that the judge is biased and prejudiced and not qualified to sit in the case, but he has no relief whatever. That has provoked, and will continue to provoke as long as the law stands as now, criticism on the court; some of it may be just, some of it may be unjust.

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances. [Italics supplied.]

Thus, it is clear from the foregoing history that Congress intended Section 21 to confer upon every litigant in the federal courts the right to demand one change of venue in every case when he and his counsel were willing to file an affidavit stating "the facts and the reasons for the belief * * * that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit." Such a statute, as certain members of Congress pointed out, may be subject to some abuse. However, after weighing the advantages and disadvantages, Congress never-

theless passed the statute in its present mandatory form, apparently believing that the federal judiciary should be above suspicion even though the statute might be occasionally invoked by a disgruntled litigant or an unscrupulous lawyer in a spirit of personal vindictiveness. Since Congress made the choice of policy, it is not for the courts to rewrite the statute. Furthermore, the feared abuses are more imaginary than real. A litigant who makes false accusations may be indicted for perjury and a lawyer who certifies that an affidavit is made "in good faith" when it contains purely frivolous reasons for the "belief" that a judge is prejudiced would be subject to disbarment. The statute permits only one such affidavit to be filed in a particular case and the litigant has no voice in the selection of the substitute judge.

In the leading case interpreting Section 21, *Berger* v. *United States,* 255 U. S. 22,[5] this Court held that the functions of the judge to whom an affidavit of prejudice is submitted are extremely narrow.[6] The Court declared (pp. 35–36):

> We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, *if it show the objectionable inclination or dis-*

[5] The *Berger* case is not cited in the petition for certiorari.

[6] *Lewis* v. *United States*, 14 F. (2d) 369 (C. C. A. 8); *Morris* v. *United States*, 26 F. (2d) 444 (C. C. A. 8), certiorari denied, 278 U. S. 587, affirmed on other points, 279 U. S. 63.

position of the judge, which we have said is an essential condition, *it is his duty to "proceed no further"* in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? And any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of section 21 has therefore no deterring consequences, and *we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used.* They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury restrain from that—perjury in him who makes the affidavit, connivance therein of counsel thereby subjecting him to disbarment. And upon what inducement and for what achievement? No other than trying the case by one judge rather than another, neither party nor counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, *we must conclude Congress was aware of them and considered that there were countervail-*

ing benefits. At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. *Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated* in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The remedy by appeal is inadequate.* It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. [Italics supplied.]

The *Berger* case notes that the affidavit "must show the objectionable inclination or disposition of the judge." That requirement is plainly met here. And the *Berger* case also indicates that an affidavit "must be based upon something other than rulings in the case" (255 U. S. at 31)[7] But in the instant case the affidavit was not based on petitioner's judicial rulings but on his general attitude and conduct in and out of the courtroom. Certainly the remarks made to Government counsel in a corridor outside the courtroom (R. 10) cannot be regarded as a judicial ruling.

The cases on which petitioner relies (Pet. 10–13) create no conflict. This statute was not involved in *National Labor Relations Board* v. *Baldwin Locomotive Works,* 128 F. (2d) 39 (C. C. A. 3) or *Walker* v. *United States,* 116 F. (2d) 458 (C. C. A. 9). In *Price* v. *Johnston,* 125 F. (2d) 806 (C. C. A. 9), certiorari denied, 316 U. S. 677, the allegation in the affidavit that the trial judge was affiliated with a bank in the vicinity of the bank for the robbery of which defendant was indicted was of course held legally insufficient, since it did not indicate any "objectionable inclination or disposition of the judge" toward the accused. And the other cases merely hold, in accord with the *Berger* case, that allegedly hostile rulings made in the same case afford insufficient

[7] *Ex parte American Steel Barrel Co.*, 230 U. S. 35 is explained in the *Berger* case as standing merely for this proposition.

grounds for the removal of the judge,[8] and that judicial rulings made by the same judge in similar cases actually disclosed no personal bias or prejudice against the affiant.[9]

There would appear to be no merit in petitioner's assertion (Pet. 8, 9) that the affidavits fail to show personal bias in favor of the landowners or against the United States. Petitioner's loyalty to the United States as a nation is not incompatible with prejudice against the United States as a litigant, or in favor of its adversary, when the Government is a particular type of litigant. The construction which petitioner would give to the statute would make it impossible for the Government to invoke its provisions—at least in the absence of treasonable misconduct by a district judge. It was the intention of Congress that any litigant, private or governmental, should be protected by the provisions of Section 21, for a provision in the original bill excluding cases brought by the Govern-

[8] *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6), certiorari denied, 316 U. S. 671; *Scott* v. *Beams*, 122 F. (2d) 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *Ryan* v. *United States*, 99 F. (2d) 864 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8); *Morse* v. *Lewis*, 54 F. (2d) 1027 (C. C. A. 4), certiorari denied, 286 U. S. 557; *Craven* v. *United States*, 22 F. (2d) 605 (C. C. A. 1), certiorari denied, 276 U. S. 627.

[9] *Ryan* v. *United States*, 99 F. (2d) 864 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Sacramento Suburban Fruit Lands Co.* v. *Tatham*, 40 F. (2d) 894 (C. C. A. 9), certiorari denied, 282 U. S. 874.

ment was deleted from the statute as it was finally passed. See 46 Cong. Rec. 306. Section 21 has on occasion been invoked by the United States in unreported cases. See 20 St. Louis L. Rev. 321, 329 (1935). Because the United States can only act through agents, there is nothing inherently absurd and no connotation of treason in an affidavit alleging personal bias in favor of a landowner and against the Government.

And the fact that the United States can only act through agents is also a complete answer to petitioner's objection (Pet. 9, 12) that an affidavit signed by counsel rather than by the party litigant is insufficient. The special attorneys of the Department of Justice handling condemnation cases in Kansas were authorized by the Attorney General to file the affidavits in question on behalf of the United States (R. 46A). They were, for the purpose of signing those affidavits, the United States. And as counsel for the Government, they further certified that the affidavits were filed in good faith. In other words, they were acting in a dual capacity.

Nor can it be said that the affidavits were not timely (Pet. 8, 12–13). The statute requires such affidavits to be filed "not less than ten days before the beginning of the term of the court, or good cause * * * shown for the failure to file it within such time." The happenings relied upon in the affidavits to support the claim of bias and prejudice did not occur until October 1942. This surely

constituted "good cause" for not having filed the affidavits ten days before the commencement of the May term. As soon as the trial court's bias and prejudice became evident, the field attorneys promptly requested and obtained leave from the Attorney General to file the affidavits. The affidavits were filed on October 30, 1942, ten days before the cases were to be heard, and were therefore timely.

2. Petitioner's second major contention (Pet. 8, 12) that the facts stated in the Government's petition for mandamus did not justify the issuance of the writ is also without merit. Petitioner, of course, recognizes that the circuit courts of appeals may under exceptional circumstances issue writs of mandamus in aid of their appellate jurisdiction, and that this power exists even before the appellate court obtains actual jurisdiction of the case. Section 262 of the Judicial Code (28 U. S. C. 377); *McClellan* v. *Carland,* 217 U. S. 268, 279–280; *United States* v. *Mayer,* 235 U. S. 55, 65–66; *Henderson Tire and Rubber Co.* v. *Reeves,* 14 F. (2d) 903, 905 (C. C. A. 8), certiorari denied, 273 U. S. 744. But he denies that the Government's petition disclosed facts sufficiently exceptional to justify the writ in this instance (Pet. 8, 12).

In this case the petitioner was under a statutory duty to "proceed no further." Authority to hear the case was vested in such other judge as the senior circuit judge might designate. 28

U. S. C., §§ 21, 27. Mandamus is a customary remedy issued to prevent trial before a judge precluded by statute from exercising jurisdiction.

The ordinary rule that mandamus will not lie where there is a remedy by appeal does not bar issuance of the writ in this type of situation. The object of Section 21 was to prevent a party from being compelled to try his case before a judge alleged to be biased. The important public policy embodied in this provision would be defeated if a party were required, after a judge had refused to recuse himself, to proceed to trial before that judge and test the validity of the refusal on a subsequent appeal. In an analogous situation, this Court has permitted the use of mandamus to prevent a single judge from exercising jurisdiction where three judges are required by statute (*Ex parte Bransford,* 310 U. S. 354), even though the failure of the judge to call in two additional judges could be corrected after trial on the merits before him and appeal to a circuit court of appeals (cf. *Query* v. *United States,* 316 U. S. 486). In that situation as in this, the public interest safeguarded by the statute depriving the judge of authority would be frustrated if the case were required to proceed before him.[10] Cf. *Ex parte Collins,* 277 U. S. 565, 569.

[10] In this connection, see the remarks of this Court in *Berger* v. *United States,* quoted *supra* p. 17. As the three-judge court cases show, the fact that the district judge exercised his judgment in the first instance does not preclude mandamus.

The record discloses (R. 3–4, 47–48) that a great number of condemnation cases were pending in Kansas, involving large amounts of money and numerous landowners, that if these cases were tried before petitioner and the affidavits of bias and prejudice were subsequently sustained on appeal, the retrial of all cases heard in the interim would result in a multiplicity of appeals and a needless expenditure of time and money. Since the case at bar is the kind of case in which mandamus may properly issue, such factors may be considered by the court called upon to grant the writ.

CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this Court and raises no new questions of substance. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 765.

RICHARD J. HOPKINS, Judge of the United States District Court for the District of Kansas, *Petitioner,*

vs.

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REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

We propose to discuss three points:

1. The accuracy of the "statement" contained in respondent's brief.

2. The contention advanced in respondent's brief that under the correct construction of section 21 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1090, 28 U.S.C. 25) every litigant who files the statutory affidavit accompanied by a certificate of counsel is entitled to one

change of venue as a matter of right without regard to the reasons he gives for his belief that personal bias and prejudice exists upon the part of the judge.

3. Respondent's answer to the conflicts shown in the petition as to the sufficiency of the reasons stated in the affidavit for belief that petitioner has a personal bias and prejudice against the United States.

I.

The statement of facts in respondent's brief is so inaccurate as to present an entirely different picture than the record. The only personal knowledge that Washington counsel have of the present controversy is that obtainable from the printed record. They do not confine themselves to the record, however, and in departing therefrom they enter a field in which the "facts" have to be supplied by imagination and conjecture. The facts themselves vary markedly from counsel's supposition of what the facts *should* be.

The statement on page 3 of the brief that Kansas lawyers and litigants follow the practice of disregarding every award and of appealing therefrom reveals the unfamiliarity of Washington counsel with Kansas practice. There is no trial or hearing before the appraisers (G. S. Kan. 1935, 26-101), but the appraisers appointed by the court are generally competent men and in the great majority of cases no appeal is taken by either party. It is true, however, that the United States has followed the practice of appealing from each and every award, regardless of amount, following which attempts are made to arrive at settlements during the period of delay incident to jury trials and the fact that not more than two terms of court are held in a year in any particular city in Kansas. In land condemnation cases in Kansas

the special attorneys for the United States have followed the not unfamiliar practice of attempting to secure settlements at their own figure by prolonged litigation.[1]

The statement on pages 3 and 4 that the experience of the United States has been that lower verdicts are returned by juries than by commissioners or courts, as a consequence of which the United States demands jury trials is a figment of counsel's imagination. As a consequence of petitioner's agreement not to try any land condemnation cases until the disposition of the present litigation a judge has been assigned to try such cases to the end that the landowners will not be longer delayed in securing the compensation held up by the appeals by the United States. The verdicts in jury trials before the assigned judge have averaged the amounts of the appraisals. In several cases they have exceeded the appraisals. This judge is more satisfactory to local counsel for the United States than the petitioner and since his designation a part of the cases are now being tried to the court. The statement on page 3 of the brief that petitioner attempted to induce government counsel to accept the awards of appraisers is not supported by the record, and is untrue in fact. The statement on page 4 that respondent's local attorneys became *persona non grata* to petitioner is not justified by anything in the record.

---

[1] In his written opinion petitioner stated, "It is unfortunate indeed, and certainly regrettable that during a war emergency, when all are expected to give their time, endeavor, and money to the war effort, that delaying tactics should be adopted by attorneys representing the Government, at great expense to both the Government and the landowners involved in this litigation. (R. 37) * * * It (the court) believes that the Kansas farmers who were evicted from their homes and farms more than a year ago should not be further delayed in receiving their just compensation through tactics by counsel for the Government." (R. 45)

We take particular exception to the contents of the footnote on page 4 of the brief. Respondent says that the cases were to be tried in October and November. This was true only if juries were demanded. The cases could have been tried to the court in the summer as petitioner urged. (R. 29) The statement that October and November is a slack time for Kansas farmers reveals the lack of experience of Washington counsel with Kansas farming operations. All the cases in which affidavits of bias and prejudice were filed related to land located within the eastern one-fourth of the state. These were small farms, many of them dairy farms, not huge wheat farms such as may be found in the western part of the state. The farmers in this area work 365 days per year and they are very long days. The statement that it is customary to use the same jury to value all the different parcels involved in a particular taking is contrary to respondent's complaint filed in the court below, as well as to the fact. The complaint alleges "that on said appeals the parties are entitled to separate jury trials as to each separate tract." (R. 3) Exhibit "K" introduced by respondent shows that as many as 350 tracts are involved in a single taking. (R. 47) The greatest number of tracts presented to a single jury for evaluation up to the present time has been ten. (The greatest number of tracts tried before the assigned judge in a single action is five.) The complaint alleged that appeals involving 255 separate tracts were already pending and that 869 additional tracts were involved in cases in which no appraisals had yet been filed. (R. 3)

We refrain from discussing respondent's description of the contents of the affidavits on pages 4 to 6 of its brief. The court can read the affidavits itself and make its own conclusion as to the contents.

The statement on page 7 of the brief that all three of the judges agreed that the affidavit was sufficient is untrue. The judgment of the Circuit Court of Appeals was announced from the bench, at which time Judge Phillips announced that he dissented from the judgment of the majority for the reason that he was of the opinion that the facts and circumstances did not justify the extraordinary writ of mandamus and that entertaining that view he had not considered any of the other questions raised. It is only fair to state, however, that none of respondent's present counsel were present at the time.

II.

The petition for certiorari was filed upon the theory that the decision of the Circuit Court of Appeals for the Tenth Circuit was in conflict with the decisions of other Circuit Courts of Appeals as to the legal sufficiency of the grounds stated in the affidavit for belief that petitioner had a personal bias and prejudice against the United States. We did not contend that the Circuit Court of Appeals ignored the decisions of this court and of every other Circuit Court of Appeals upon the fundamental rule that it is the duty of the trial judge to consider the affidavit of personal bias and prejudice and to pass upon the legal sufficiency of the stated grounds for belief that personal bias and prejudice exists.

Respondent's brief, however, presents a more striking and imperative reason for granting the writ than the petition itself. Respondent's opposition to the granting of the writ is founded primarily (almost exclusively) upon the theory that the intent of the statute is to entitle every litigant who complies with its terms to one change of venue wihout regard to the reasons he gives for his belief that a judge has a personal bias and prejudice against

him or in favor of his adversary. Respondent's *present* interpretation of the statute is concisely stated on page 13 of its brief as follows:

> "Thus, it is clear from the foregoing history that Congress intended Section 21 to confer upon every litigant in the federal courts the right to demand one change of venue in every case when he and his counsel were willing to file an affidavit stating 'the facts and the reasons for the belief * * * that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit.'"

This construction of the statute is at odds with the decisions of this court and of every Circuit Court of Appeals which has had occasion to pass upon the question. In *Berger v. United States,* 255 U. S. 22, upon which respondent relies, the questions certified were the following:

> "(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?
>
> "(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?
>
> "(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?"

Those questions were answered by the court as follows:

> "We come, then, to the questions certified, and to the first we answer, Yes; that is, that the affidavit

of prejudice is sufficient to invoke the operation of the act. To the second we answer that, to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third, we answer No; that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment."

Our interpretation of the court's opinion is that it is the duty of the district judge to pass upon the legal sufficiency of the affidavit of bias including the legal sufficiency of affiant's grounds for belief that bias and prejudice exists, but that the district judge must accept as true the statements of fact in the affidavit. That interpretation of the opinion in the Berger case and of the statute has been adopted by the various Circuit Courts of Appeals.[2]

A typical statement of the rule followed by the Circuit Courts of Appeals is found in *Simmons v. United States,*[3] where the court said, "The judge may not consider whether the facts are truthfully recited, but he may pass upon their sufficiency as showing personal prejudice."

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[2] First Circuit: *Craven v. United States,* 22 F. 2d 605, cert. den. 276 U. S. 627; Second Circuit: In re Lisman, 89 F 2d 898; Fourth Circuit: *Morse v. Lewis,* 54 F. 2d 1027, cert. den. 286 U. S. 557; Fifth Circuit: *Simmons v. United States,* 89 F. 2d 591, cert. den. 302 U. S. 700; Sixth Circuit: *Refior v. Lansing Drop Forge Co.,* 124 F. 2d 440, cert. den. 316 U. S. 671; Eighth Circuit: *Cuddy v. Otis,* 33 F. 2d 577; Ninth Circuit: *Price v. Johnston,* 125 F. 2d 806, cert. den. 316 U. S. 677; Tenth Circuit: *Mitchell v. United States,* 126 F. 2d 550, cert. den. 316 U. S. 702.

[3] 5 Circuit., 89 F. 2d 591, cert. den. 302 U. S. 700.

The construction given to the statute in the cases cited in the footnotes is a construction which the Department of Justice has heretofore consistently advocated.[4]

The brief of respondent presents the peculiar situation of the Department of Justice asking that certiorari be *denied* because this court and all the Circuit Courts of Appeals, except the court below (and it in only this instance), have erroneously construed a Federal statute for the past thirty years. The situation is even more singular in that the construction of the statute which the Department of Justice now contends is erroneous is one which it has always before successfully advocated.

If we assume that the construction of the statute for which the Department of Justice now contends is the correct one, it would seem imperative that the writ of certiorari should be granted so that this court might correct the erroneous interpretation placed upon an important Federal statute by it and all the lower courts which have followed its authoritative, but erroneous, statement of the law. If the interpretation of the statute is to be changed it should be done by the court rather than by the Department of Justice. One thing is certain—the statute must be construed in the same fashion whether an affidavit of bias and prejudice is filed by the United States or by one of its citizens. If the judgment of the court below is to be sustained upon the ground that the statute has been incorrectly construed in the past an announcement of that fact should be made by this court so that the lower courts and private litigants may be guided thereby.

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[4] See for example *Craven v. United States,* supra; *Simmons v. United States,* supra; *Cuddy v. Otis,* supra; *Mitchell v. United States,* supra.

III.

So much stress is laid in respondent's brief upon the novel contention above discussed that the question raised in the petition as to the conflict between the decision of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals as to the sufficiency of the grounds stated in the affidavit for belief that petitioner has a personal bias and prejudice against the United States has almost been ignored in respondent's brief. This is only natural since respondent's primary contention necessarily admits a conflict with the decisions of other Circuit Courts of Appeals. The subject of the sufficiency of the grounds stated in the affidavits for belief that personal bias and prejudice exists within the rules heretofore followed by the various Circuit Courts of Appeals is disposed of by respondent in two short paragraphs of its brief. (Top of page 17, first paragraph page 18.) Only the Berger case is cited and it is not applied to the facts of the case at bar. Along with the court, we are left in the dark as to respondent's theory as to which of petitioner's rulings or remarks of which complaint is made in the affidavit are claimed to show personal bias and prejudice and as to respondent's reasons for arriving at that conclusion.

Respondent does make it plain that it contends that bias and prejudice against an agent or attorney of the United States is bias and prejudice against the United States itself since it can only act through agents. (Brief, pp. 18, 19.) If this is true as to a public corporation it must be equally true as to a private corporation for the same reason. The statute requires that the affidavit must be made by a "party" and must state that the judge "has a personal bias and prejudice * * * against him," not against his agents or attorneys. Respondent advances neither ar-

gument nor authority in support of its theory that the statute means something other than it appears to say. Respondent's contention upon this point is apparently closely related to its contention that every litigant is entitled to one change of venue as a matter of right. If the statute is construed to mean that personal bias against an *attorney* is personal bias against a *party* every litigant could secure a new judge by choice of his counsel. He could file an affidavit that the judge was prejudiced against his attorney and as grounds for such a belief could truthfully aver that in some previous case the judge had reprimanded his counsel for an improper argument to a jury or for persistently following a line of examination which the judge had held to be improper. Even if we assume that prejudice against an attorney is prejudice against the United States we are still not furnished by respondent with any inkling of the basis for respondent's conclusion that one or more of the rulings or remarks complained of indicate personal bias and prejudice upon the part of petitioner against respondent's counsel or other agents of the United States.

Respondent makes the statement that personal bias and prejudice within the meaning of the statute is satisfied by a showing of prejudice "against the United States as a litigant * * * when the United States is a particular type of litigant. (Brief, p. 18.) This contention eliminates the word "personal," which the Circuit Courts of Appeals have held to be the most important word in the statute.[5] As the United States has frequently contended, a judge having a particularly strong feeling against bank robbery or election frauds is not thereby

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[5] *Craven v. United States*, supra.

disqualified from trying one charged with those crimes, because he does not have the personal bias against a party which is mentioned in the statute.[6]

On page 19 of its brief respondent argues that the requirements of the statute that the affidavit be made by a party and be accompanied by a certificate of counsel of record to the effect that it is filed in good faith are satisfied by an affidavit by counsel of record who certify that their own affidavit is filed in good faith. Respondent states this procedure is sufficient because a body corporate can act only through agents and its attorneys of record were acting in separate and distinct capacities in making the affidavit and in certifying that it was filed in good faith. This argument disregards the fact that the purpose of requiring both an affidavit of a party and a certificate of counsel was to prevent abuse of the privilege afforded by the statute. What safeguard was there in this case? An attorney who makes an affidavit of bias and prejudice would certainly have no hesitancy in certifying that he made it in good faith. Judges would be disqualified at the whim of counsel.

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[6] *Price v. Johnston*, supra; *Ryan v. United States*, 8 Cir., 99 F. 2d 864, cert. den. 306 U. S. 635.

CONCLUSION.

The contention of respondent that the intent of section 21 of the Judicial Code is to make a change of judge a matter of right upon the filing of an affidavit of bias and prejudice is a concession that certiorari should be granted so that the erroneous interpretation now followed by the courts may be corrected. Respondent's failure to advance any theory upon which the judgment of the Circuit Court of Appeals can be reconciled with the decisions of other Circuit Courts of Appeals cited on pages 10 to 13 of the petition for certiorari is an admission that a conflict exists.

We respectfully submit that the petition for a writ of certiorari should be granted.

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Number 765.

IN THE

Supreme Court of the United States

October Term, 1942.

RICHARD J. HOPKINS, Judge of The United States District Court for the District of Kansas,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR RE-HEARING.

We fully appreciate that a review by this court on writ of certiorari is not a matter of right, that the fact that the judgment appealed from may be erroneous is not of prime importance and that the writ will be granted only where there are important reasons therefor. We conceive this to be such a case. This case involves neither money nor property. It involves the independence of United States District Judges in the exercise of the functions required by their judicial office. Not in the history of this country has a district judge been removed

from the performance of his judicial duties by a higher court without written opinion stating the reason therefor. This case raises the question of whether a Federal statute means one thing when invoked by the United States and another when invoked by its adversary.

In this case an affidavit of bias and prejudice was filed by special (local) attorneys for the Department of Justice alleging that petitioner, a United States District Judge, "has a personal bias and prejudice against the United States of America." (R. 6, paragraph numbered 2). The affidavit contains detailed allegations of the "facts and the reasons for the belief that such bias and prejudice exists." (R. 6-17) In this court, the Department of Justice does not attempt to reconcile the numerous decisions of the various Circuit Courts of Appeals with the judgment of the Circuit Court of Appeals for the Tenth Circuit in the present case, as to the legal sufficiency of those reasons. Instead it contends that Section 21 of the Judicial Code entitles a litigant to a change of venue as a matter of right upon the filing of an affidavit, whatever may be the facts and reasons for belief bias and prejudice exists. (Brief of United States in Opposition, pp. 8-16). The various Circuit Courts of Appeals take a different view, holding that the facts and reasons given must be legally sufficient to show such bias and prejudice and that the district judge must determine whether the grounds stated meet that requirement.[1]

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[1] Illustrative cases are:

Craven v. United States, 1 Cir. 22 F. 2d 605, Cert. Den. 276 U. S. 627; *In re Lisman*, 2 Cir. 89 F. 2d 898; *Morse v. Lewis*, 4 Cir., 54 F. 2d 1027, Cert. Den. 286 U. S. 557; *Simmons v. United States*, 89 F. 2d 591; *Refior v. Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, Cert. Den. 316 U. S. 671; *Cuddy v. Otis*, 8 Cir., 33 F. 2d 577; *Price v. Johnston*, 9 Cir., 125 F. 2d 806, Cert. Den. 316 U. S. 677.

In a majority of the cases in which the Circuit Courts of Appeals have laid down the rule that the reasons stated must be legally sufficient the United States has been a party, and the decision as to the meaning of the statute has been in accord with its contention. There are no reported decisions in which the Department of Justice has sought disqualification of a United States District Judge nor in which it has ever contended or conceded that a change of venue is a matter of right upon the filing of the statutory affidavit. The Department of Justice has been successful in establishing a rule of law requiring a litigant to state legally sufficient reasons for belief that a judge is prejudiced. It now contends that this rule applies only to its *adversaries* and that when it desires a change of judge the statute means that a change of venue is a matter of right.

We assume that this peculiar position of the Department of Justice results from a theory that some restraint upon private litigants and their attorneys is necessary to prevent abuse; but that the Department of Justice, taking a more judicial view than the ordinary advocate, will exercise such self-restraint that it will file affidavits in only those cases in which the facts entitle the United States to a change of venue, making unnecessary any restraint upon the Department's demand for a change of judge. Conceding that the Department of Justice and all its attorneys throughout the country are more restrained and judicial than the ordinary attorney, still Congress did not see fit to accord to the United States any greater right to a change of venue than to any other litigant. The Department's theory conflicts with the fundamental concept that ours is a government of laws and not of men.

The theory advanced by the United States in opposition to the granting of the writ would seem to make its allowance imperative, rather than important. If the theory of the United States as to the meaning of Section 21 of the Judicial Code is limited to this case and others in which the United States may seek disqualification of a judge, the granting of the writ is necessary to prevent the judicial branch of the government from being made subservient to the executive. If the theory advanced in the brief of the government has been adopted for all time by the Department of Justice, certiorari is necessary to correct the statement of the rule now followed by all the Circuit Courts of Appeals except the court below. Common honesty requires the United States to confine itself to a single interpretation of the statute whether it or its adversary files an affidavit of prejudice.

The judgment of the Circuit Court of Appeals for the Tenth Circuit is in irreconcilable conflict with the decisions of the other Circuit Courts of Appeals as to the sufficiency of the grounds stated in the affidavit for belief that bias and prejudice exist.

Such affidavits are required to be strictly construed to prevent abuse.[2] The significant word in the statute is the word "personal". By personal prejudice is meant an attitude against a party derived otherwise than through judicial proceedings. No statement of opinion based upon evidence or the proceedings before a judge can

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[2] *Beland v. United States*, 5 Cir., 117 F. 2d 958, Cert. Den. 313 U. S. 585.

form the basis for a charge of personal prejudice against a party as such term is used in the statute.[3] Judicial rulings against the same party in prior trials of like character are not personal prejudice within the meaning of the statute.[4] Reasons or comments of the judge in making judicial rulings do not constitute personal prejudice. Neither irritation upon the part of a judge nor comments upon the judicial tactics of a party or his counsel are sufficient to show personal prejudice, whether such comments are discreet or indiscreet.[5] Impersonal prejudice resulting from a judge's background or experience

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[3] *Craven v. United States*, 1 Cir., 22 F. 2d 605, Cert. Den. 276 U. S. 627, where it was said " 'Personal' is in contract with judicial, it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute." In *Ryan v. United States*, 8 Cir., 99 F. 2d 864, Cert. Den. 306 U. S. 635, it was said: "An opinion based upon evidence cannot be considered a personal prejudice."

[4] *Sacramento Suburban Fruit Lands Co. v. Tatham*, 9 Cir., 40 F. 2d 894, Cert. Den. 282 U. S. 874.

[5] *In Refior v. Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, Cert. Den. 316 U. S. 671, the court said, "Denial of continuance, or the dismissal of a cause of action, coupled with a showing of irritation of the trial judge at the time of the entry of the orders, are not sufficient foundation for the application of the present section of the judicial code, otherwise a litigant could experiment as to the attitude of a trial judge and relitigate issues before another judge, to the annoyance and expense of parties with resulting delay in the disposal of cases." *In re Lisman*, 2 Cir., 89 F. 2d 898, the court said, "There is proof only of indiscreet expressions by the District Judge. These facts do not establish bias or prejudice."

or prejudice against a particular type of litigation is not prejudice within the meaning of the statute.[6]

To reconcile the judgment of the Circuit Court of Appeals as to the sufficiency of the affidavit with the decisions of the Circuit Courts of Appeals for the First, Second, Fifth, Sixth, Eighth and Ninth Circuits cited in footnotes 2 to 6, it was necessary that the affidavit state facts from which any reasonable person would conclude that petitioner was so prejudiced against the United States that he could not afford the United States a fair and impartial trial in any action, without regard to its character, and that this prejudice was not derived from any judicial proceedings before him, but was of non-judicial origin. The affidavit shows the opposite.

Every charge in the affidavit relates to matters arising out of judicial proceedings before the petitioner. In

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[6] In *Price v. Johnston*, 9 Cir., 125 F. 2d 806, Cert. Den. 316 U. S. 677, the court said, "The statute requires that the bias or prejudice be 'personal'. The allegations of the affidavit, as disclosed by the petition for the writ, do not indicate a 'personal' prejudice or bias against the accused, but charge an impersonal prejudice and go to the judge's background and associations rather than his appraisal of the defendant personally. This is not enough under the statute, and the affidavit must be here held to have been insufficient under the law. The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent.' Appellant's allegations reveal that 'the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment on the merits of the controversy. * * * ' *Henry v. Speer*, 5 Cir. 201 F. 869, 871, 872."

most instances the charges relate to matters which arose in the course of judicial proceedings. Every comment upon and criticism of the tactics of the special attorneys for the Department of Justice was a comment upon matters which petitioner observed in the course of judicial proceedings before him and was a statement of conclusions derived from his personal observation of those judicial proceedings.

The conflict between the judgment of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals cited in the footnotes is so obvious that no attempt was made by the United States in its brief to reconcile the decisions. Instead it advanced a new theory. Section 21 of the Judicial Code is an important statute. It is invoked constantly. It has been before the courts in nearly one hundred reported cases and in a far greater number of unreported cases. In a majority of cases in which a change of judge is sought the United States is the adverse party. If a conflict between the judgment of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals upon the interpretation of an important Federal statute is a ground for certiorari, the petition should be granted in this case.

Respectfully submitted,

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This petition for rehearing is presented in good faith and not for purposes of delay.

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